

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 23

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Clarification of the Use of Appendix I of the Clean Air
Act Stationary Source Civil Penalty Policy

FROM: Kathie A. Stein (2242.A) (Signature)
Air Enforcement Division
Office of Enforcement and Compliance Assurance

TO: Regional Division Directors

Region IV recently raised questions concerning the Clean Air Act Stationary Source Civil Penalty Policy (general policy). Specifically, the Region asked whether the Gravity Component in Appendix I ("The Permit Penalty Policy") should be used in addition to the general policy's gravity component when calculating the penalty amount, and specifically, whether "size of the violator" is included in addition to the penalty amount as calculated using the appendix. The policy may be confusing because of a clerical error on page 3 of Appendix I, which reads as follows:

The economic benefit component and the gravity component are added together to determine the preliminary deterrence amount. This initial amount should then be adjusted, using the general stationary source civil penalty policy factors which take into consideration individual equitable considerations (Part III of the general policy).

This paragraph applied to Part III of September 12, 1984 general Clean Air Act policy, Adjusting the Gravity Component, and to the later policy revision in March 1987. The error occurred when the table of contents was changed during the 1991 revision of the general policy. Part III became Parts II.B.4.

and IV, but the reference was inadvertently left unchanged in the above passage in Appendix I. The paragraph should read as follows:

The economic benefit component and the gravity component are added together to determine the preliminary deterrence amount. This initial amount should then be adjusted, using the general stationary source civil penalty policy Part II.B.4., Adjusting the Gravity Component, Part III, Litigation Risk, Part IV, Ability to Pay, and other relevant adjustments.

Therefore, Appendix I is to be used instead of Parts II.B.1 through Part II.B.3., which include the calculations for actual or possible harm, importance to the regulatory scheme, and size of violator. However, the adjustments to the gravity component contained in Part II.B.4.(which was Part III of the 1984 and 1987 policies), still apply when Appendix I is used. These adjustments include degree of willfulness or negligence, degree of cooperation, history of noncompliance, and environmental damage.

As stated on page 2 of Appendix I, the gravity component is calculated based on the matrix in the appendix, which assesses a penalty based on an estimate of the total cost of air pollution control at the source, times the number of months of isolation. If there are not other violations for which the gravity component of the general policy applies, then you do not add the size of the violator component from Part II.B.3. of the general policy. The reason is that Appendix I of the policy provides larger penalties for larger violators, under the assumption that they will have larger (and more expensive) control equipment involved in the violation. The Appendix I matrix, in addition to the economic benefit component, is intended to provide a sufficient penalty to deter violations. However, if there are other violations for which the general policy applies (e.g., emissions violations), then "size of violator" is factored in as a one-time addition to the proposed penalty.

If you have any questions concerning this or any other penalty policy matter, you may direct them to Mr. Cary Secrest of my staff at (202) 564-8661.

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CLEAN AIR ACT STATIONARY SOURCE CIVIL PENALTY POLICY

I. INTRODUCTION

Section 113(b) of the Clean Air Act, 42 U.S.C. § 7413(b), provides the Administrator of EPA with the authority to commence a civil action against certain violators to recover a civil penalty of up to \$25,000 per day per violation. Since July 8, 1980, EPA has sought the assessment of civil penalties for Clean Air Act violations under Section 113(b) based on the considerations listed in the statute and the guidance provided in the Civil Penalty Policy issued on that date.

On February 16, 1984, EPA issued the Policy on Civil Penalties (GM-21) and a Framework for Statute-Specific Approaches to Penalty Assessments (GM-22). The policy focuses on the general philosophy behind the penalty program. The Framework provides guidance to each program on how to develop medium-specific penalty policies. The Air Enforcement program followed the Policy and the Framework in drafting the Clean Air Act Stationary source Civil Penalty Policy, which was issued on September 12, 1984, and revised March 25, 1987. This policy amends the March 25, 1987 revision, incorporating EPA's further experience in calculating and negotiating penalties. This guidance document governs only stationary source violations of the Clean Air Act. All violations of Title II of the Act are governed by separate guidance.

The Act was amended on November 15, 1990, providing the Administrator with the authority to issue administrative penalty orders in Section 113(d), 42 U.S.C. § 7413(d). These penalty orders may assess penalties of up to \$25,000 per day of violation and are generally authorized in cases where the penalty sought is not over \$200,000 and the first alleged date of violation occurred no more than 12 months prior to initiation of the administrative action. In an effort to provide to initiation of the administrative action. In an effort to provide consistent application of the Agency's civil penalty guidance used in calculating administrative penalties under Section 113(d) of the Act and will be used in calculating a minimum settlement amount in civil judicial cases brought under Section 113(b) of the Act.

In calculating the penalty amount which should be sought in an administrative complaint, the economic benefit of noncompliance and a gravity component should be calculated under this penalty

policy using the most aggressive assumptions supportable. Pleadings will always include the full economic benefit component. As a general rule, the gravity component of the penalty plead in administrative complaints may not be mitigated. However, the gravity component portion of the penalty may be mitigated by up to ten per cent solely for degree of cooperation. Any mitigation for this factor must be justified under Section II.B.4.b. of this Policy. The total mitigation for good faith efforts to comply for purpose of determining a settlement amount may never exceed thirty per cent. Applicable adjustment factors which aggravate the penalty must be included in the amount plead in the administrative complaint. Where key financial or cost figures are not available, for example those costs involved in calculating the BEN calculation, the highest figures supportable should be used.

This policy will ensure the penalty plead in the complaint is never lower than any revised penalty calculated later based on more detailed information. It will also encourage sources to provide the litigation team with the more accurate cost or financial information. The penalty may then be recalculated during negotiations where justified under this policy to reflect any appropriate adjustment factors. In administrative cases, where the penalty is recalculated based upon information received in negotiations or the prehearing exchange, the administrative complaint must be amended to reflect the new amount if the case is going to or expected to go to hearing. This will ensure the complaint reflects the amount the government is prepared to justify at the hearing. This pleading policy also fulfills the obligation of 40 C.F.R. § 22.14(a)(5) that all administrative complaints include "a statement explaining the reasoning behind the proposed penalty."

This policy reflects the factors enumerated in Section 113(e) that the court (in Section 113(b) actions) and the Administrator (in Section 113(d) actions) shall take into consideration in the assessment of any penalty. These factors include: the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation, payment by the violator of penalties assessed for the same violation and such other factors as justice may require.

This document is not meant to control the penalty amount requested in judicial actions to enforce existing consent

decrees.¹ In judicial cases, the use of this guidance is limited to pre-trial settlement of enforcement actions. In a trial, government attorneys may find it relevant and helpful to introduce a penalty calculated under this policy, as a point of reference in a demand for penalties. However, once a case goes to trial, government attorneys should demand a larger penalty than the minimum settlement figure as calculated under the policy.

The general policy applies to most Clean Air Act violations. There are some types of violations, however, that have characteristics which make the use of the general policy inappropriate. These are treated in separate guidance, included as appendices. Appendix I covers violations of PSD/NSR permit requirements. Appendix II deals with the gravity component for vinyl chloride NESHAP violations. Appendix III covers the economic benefit and gravity components for asbestos NESHAP demolition and renovation violations. The general policy applies to violations of volatile organic compound regulations where the method of compliance involves installation of control equipment. Separate guidance is provided for VOC violators which comply through reformulation (Appendix IV). Appendix VI deals with the gravity component for volatile hazardous air pollutants violations. Appendix VII covers violations of the residential wood heaters NSPS regulations. Violations of the regulations to protect stratospheric ozone are covered in Appendix VIII. These appendices specify how the gravity component and/or economic benefit components will be calculated for these types of violations. Adjustment, aggravation or mitigation, of penalties calculated under any of the appendices is governed by this general penalty policy.

This penalty policy contains two components. First, it describes how to achieve the goal of deterrence through a penalty that removes the economic benefit of noncompliance and reflects the gravity of the violation. Second, it discusses adjustment factors applied so that a fair and equitable penalty will result. The litigation team² should calculate the full economic benefit and gravity components and then decide whether any of the adjustment factors applicable to either component are appropriate. The final penalty obtained should never be lower than the penalty calculated under this policy taking into account all appropriate adjustment factors including litigation risk and inability to pay.

All consent agreements should state that penalties paid

pursuant to this penalty policy are not deductible for federal tax purposes under 28 U.S.C. § 162(f).

The procedures set out in this document are intended solely for the guidance of government personnel. They are not intended and cannot be relied upon to create rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with this policy and to change it at any time without public notice.

This penalty policy is effective immediately with respect to all cases in which the first penalty offer has not yet been transmitted to the opposing party.

II. THE PRELIMINARY DETERRENCE AMOUNT

The February 16, 1984, Policy on Civil Penalties establishes deterrence as an important goal of penalty assessment. More specifically, it says that any penalty should, at a minimum, remove any significant economic benefit resulting from noncompliance. In addition, it should include an amount beyond recovery of the economic benefit to reflect the seriousness of the violation. That portion of the penalty which recovers the economic benefit of noncompliance is referred to as the "economic benefit component;" that part of the penalty which reflects the seriousness of the violation is referred to as the "gravity component." When combined, these two components yield the "preliminary deterrence amount."

This section provides guidelines for calculating the economic benefit component and the gravity component. It will also discuss the limited circumstances which justify adjusting either component.

A. THE ECONOMIC BENEFIT COMPONENT

In order to ensure that penalties recover any significant economic benefit of noncompliance, it is necessary to have reliable methods to calculate that benefit. The existence of reliable methods also strengthens the Agency's position in both litigation and negotiation. This section sets out guidelines for computing the economic benefit component. It first addresses costs which are delayed by noncompliance. Then it addresses costs which are avoided completely by noncompliance. It also

identifies issues to be considered when computing the economic benefit component for those violations where the benefit of noncompliance results from factors other than cost savings. The section concludes with a discussion of the limited circumstances where the economic benefit component may be mitigated.

1. Benefit from delayed costs

In many instances, the economic advantage to be derived from noncompliance to achieve compliance. For example, a facility which fails to install a scrubber will eventually have to spend the money needed to install the scrubber in order to achieve compliance. But, by deferring these capital costs until EPA or a State takes an enforcement action, that facility has achieved an economic benefit. Among the types of violations which may result in savings from deferred cost are the following:

Failure to install equipment needed to meet emission control standards.

Failure to effect process changes needed to reduce pollution.

Failure to test where the test still must be performed.

Failure to install required monitoring equipment.

The economic benefit of delayed compliance should be computed using the "Methodology for Computing the Economic Benefit of Noncompliance," which is Technical Appendix A of the BEN User's Manual. This document provides a method for computing the economic benefit of noncompliance based on a detailed economic analysis. The method is a refined version of the method used in the previous Civil Penalty policy issued July 8, 1980, for the Clean Water Act and the Clean Air Act. Ben is a computer program available to the Regions for performing the analysis. Questions concerning the BEN model should be directed to the Program Development and Training Branch in the office of Enforcement, FTS 475-6777.

2. Benefit from avoided costs

Many types of violations enable a violator to avoid permanently certain costs associated with compliance. These include cost savings for:

Disconnecting or failing to properly operate and maintain existing pollution control equipment (or other equipment if it affects pollution control).

Failure to employ a sufficient number of adequately trained staff.

Failure to establish or follow precautionary methods required by regulations or permits.

Removal of pollution equipment resulting in process, operational, or maintenance savings.

Failure to conduct a test which is no longer required.

Disconnecting or failing to properly operate and maintain required monitoring equipment.

Operation and maintenance of equipment that the violator failed to install.

The benefit from avoided costs must also be computed using methodology in Technical Appendix A of the BEN User's Manual.

The benefit from delayed and avoided costs is calculated together, using the Ben computer program, to arrive at an amount equal to the economic benefit of noncompliance for the period from the first provable date of violation until the date of compliance.

As noted above, the BEN model may be used to calculate only the economic benefit accruing to a violator through delay or avoidance of the costs of complying with applicable requirements of the Clean Air Act and its implementing regulations. There are instances in which the BEN methodology either cannot compute or will fail to capture the actual economic benefit of noncompliance. In those instances, it will be appropriate for the Agency to include in its penalty analysis a calculation of the economic benefit in a manner other than that provided for in the Ben methodology.

In some instances this may include calculating an including in the economic benefit component profits from illegal activities. An example would be a source operating without a preconstruction review permit under PSD/NSR regulations or

without an operating permit under Title V. In such a case, an additional calculation would be performed to determine the present value of these illegal profits which would be added to the Ben calculation for the total economic benefit component. Cae must be taken to account for the preassessed delayed or avoided costs included in the Ben calculation when calculating illegal profits. Otherwise, these costs could be assessed twice. The delayed or avoided costs already accounted for in the BEN calculation should be subtracted from any calculation of illegal profits.

3. Adjusting the Economic Benefit Component

As noted above, settling for an amount which does not recover the economic benefit of noncompliance can encourage people to wait until EPA or the State begins an enforcement action before complying. For this reason, it is general Agency policy not to adjust or mitigate this amount. There are three general circumstances (described below) in which mitigating the economic benefit component may be appropriate. However, in any individual case where the Agency decides to mitigate the economic benefit component, the litigation team must detail those reasons in the case file and in any memoranda accompanying the settlement.

Following are the limited circumstances in which EPA can mitigate the economic benefit component of the penalty:

- a: Economic benefit component involves insignificant amount

Assessing the economic benefit component and subsequent negotiations will often represent a substantial commitment of resources. Such a commitment may not be warranted in cases where the magnitude of the economic benefit component is not likely to be significant because it is not likely to have substantial financial impact on the violator. For this reason, the litigation team has the discretion not to seek the economic benefit component where it is less than \$5,000. In exercising that discretion, the litigation team should consider the following factors:

Impact on violator: The likelihood that assessing the economic benefit component as part of the penalty will have a noticeable effect on the violator's competitive position or overall profits. If no such effect appears

likely, the benefit component should probably not be pursued.

The size of the gravity component: If the gravity component is relatively small, it may not provide a sufficient deterrent, by itself, to achieve the goals of this policy. In situations like this, the litigation team should insist on including the economic benefit component in order to develop an adequate penalty.

b. Compelling public concerns

The Agency recognizes that there may be some instances where there are compelling public concerns that would not be serviced by taking a case to trial. In such instances, it may become necessary to consider mitigating the economic benefit component. This may be done only if it is absolutely necessary to preserve the countervailing public interests. Such settlement might be appropriate where the following circumstances occur:

The economic benefit component may be mitigated where recovery would result in plant closings, bankruptcy, or other extreme financial burden, and there is an important public interest in allowing the firm to continue in business. Alternative payment plans, such as installment payments with interest, should be fully explored before resorting to this option. Otherwise, the Agency will give the perception that shirking one's environmental responsibilities is a way to keep a failing enterprise afloat. This exemption does not apply to situations where the plant was likely to close anyway, or where there is a likelihood of continued harmful noncompliance.

The economic benefit component may also be mitigated in enforcement actions against nonprofit public entities, such as municipalities and publicly-owned utilities, where assessment threatens to disrupt continued provision of essential public services.

c. Concurrent Section 120 administrative action

EPA will not usually seek to recover the economic benefit of noncompliance from one violation under both a Section 113(b)

civil judicial action or 113(d) civil administrative action and a Section 120 action. Therefore, if a Section 120 administrative action is pending or has been concluded against a source for a particular violation and an administrative or judicial penalty settlement amount is being calculated for the same violation, the economic benefit component need not include the period of noncompliance covered by the Section 120 administrative action.

In these cases, although the agency will not usually seek double recovery, the litigation team should not automatically mitigate the economic benefit component by the amount assessed in the Section 120 administrative action. The Clean Air Act allows dual recovery of the economic benefit, and so each case must be considered on its individual merits. The Agency may mitigate the economic benefit component in the administrative or judicial action if the litigation team determines such a settlement is equitable and justifiable. The litigation team should consider in making this decision primarily whether the penalty calculated without the Section 120 noncompliance penalty is a sufficient deterrent.

B. THE GRAVITY COMPONENT

As noted above, the Policy on Civil Penalties specifies that a penalty, to achieve deterrence, should recover any economic benefit or noncompliance, and should also include an amount reflecting the seriousness of the violation. Section 113(e) instructs courts to take into consideration in setting the appropriate penalty amount several factors including the size of the business, the duration of the violation, and the seriousness of the violation. These factors are reflected in the "gravity component." This section of the policy establishes an approach to quantifying the gravity component.

Assigning a dollar figure to represent the gravity of the violations is a process which must, of necessity, involve the consideration of a variety of factors and circumstances. Linking the dollar amount of the gravity component to these objective factors is a useful way of insuring that violations of approximately equal seriousness are treated the same way. These objective factors are designed to reflect those listed in Section 113(e) of the Act.

The specific objective factors in this civil penalty policy designed to measure the seriousness of the violation and reflect

the considerations listed in the Clean Air Act are as follows:

Actual or possible harm: This factor focuses on whether (and to what extent) the activity of the defendant actually resulted or was likely to result in the emission of a pollutant in violation of the level allowed by an applicable State Implementation Plan, federal regulation or permit.

Importance to the regulatory scheme: This factor focuses on the importance of the requirement to achieving the goals of the Clean Air Act and its implementing regulations. For example, the NSPS regulations require owners and operators of new sources to conduct emissions testing and report the results within a certain time after start-up. If a source owner or operator does not report the test results, EPA would have no way of knowing whether that source is complying with NSPS emissions limits.

Size of violator: The gravity component should be increased, in proportion to the size of the violator's business.

The assessment of the first gravity component factor listed above, actual or possible harm arising from a violation, is a complex matter. For purposes of determining how serious a given violation is, it is possible to distinguish violations based on certain considerations, including the following:

Amount of pollutant: Adjustments based on the amount of the pollutant emitted are appropriate.

Sensitivity of the environment: this factor focuses on where the violation occurred. For example, excessive emissions in a nonattainment area are usually more serious than excessive emissions in an attainment area.

Toxicity of the pollutant: Violations involving toxic pollutants regulated by a National Emissions Standard for Hazardous Air Pollutants (NESHAP) or listed under Section 112(b)(1) of the Act are more serious and should result in larger penalties.

The length of time a violation continues: Generally, the longer a

violation continues uncorrected, the greater the risk of harm.

Size of violator: A corporation's size is indicated by its stockholder's equity or "net worth." This value, which is calculated by adding the value of capital stock, capital surplus, and accumulated retained earnings, corresponds to the entry for "worth" in the Dun and Bradstreet reports for publicly traded corporations. The simpler bookkeeping methods employed by sole proprietorships and partnerships allow determination of their size on the basis of net current assets. Net current assets are calculated by subtracting current liabilities from current assets.

The following dollar amounts assigned to each factor should be added together to arrive at the total gravity component:

1. Actual or possible harm

a. Level of violation

Percent Above Standard Dollar Amount

1-30%
\$5,000

31-60%
10,000

61-90%
15,000

91-120%
20,000

121-150%
25,000

151-180%
30,000

181-210%
35,000

211-240%
40,000

241-270%
45,000

271-300%
50,000

over 300%
50,000 + \$5,000 for each 30% or
fraction of 30% increment above the
standard

This factor should be used only for violations of emissions standards. Ordinarily the highest documented level of violation should be used. If that level, in the opinion of the litigation team, is not representative of the period of violation, then a more representative level of violation may be used. If that level, in the opinion of the litigation team, is not representative of the period of violation, then a more representative level of violation may be used. This figure should be assessed for each emissions violation. For example, if a source which emits particulate matter is subject to both an opacity standard and a mass emission standard and is in violation of both standards, this figure should be used for both violations.

b. Toxicity of the pollutant

Violations of NESHAPs emission standards not handled by a separate appendix and non-NESHAP emission violations involving pollutants listed in Section 112(b)(1) of the Clean Air Act Amendments of 1990: \$15,000 for each hazardous air pollutant for which there is a violation.

c. Sensitivity of environment (for SIP and NSPS cases only).

The penalty amount selected should be based on the status of the air quality control district in question with respect to the pollutant involved in the violation.

1. Nonattainment Areas

I. Ozone:

Extreme	\$18,000
Severe	16,000
Serious	14,000
Moderate	12,000
Marginal	10,000

ii. Carbon Monoxide and Particulate Matter:

Serious	\$14,000
Moderate	12,000

iii. All Other Criteria Pollutants: \$10,000

2. Attainment area PSD Class I: \$10,000

3. Attainment area PSD Class II or III: \$5,000

d. Length of time of violation

To determine the length of time of violation for purposes of calculating a penalty under this policy, violations should be assumed to be continuous from the first provable date of violation until the source demonstrates compliance if there have been no significant process or operational changes. If the source has affirmative evidence, such as continuous emission monitoring data, to show that the violation was not continuous, appropriate adjustments should be made. In determining the length of violation, the litigation team should take full advantage of the presumption regarding continuous violation in Section 113(e)(2). This figure should be assessed separately for each violation, including procedural violations such as monitoring, recordkeeping and reporting violations. For example, if a source violated an emissions standard, a testing requirement, and a reporting requirement, three separate length of violation figures should be assessed, one for each of the

three violations based on how long each was violated.

Months	Dollars
0-1	\$5,000
2-3	8,000
4-6	12,000
7-12	15,000
13-18	20,000
19-24	25,000
25-30	30,000
31-36	35,000
37-42	40,000
43-48	45,000
49-54	50,000
55-60	55,000

2. Importance to the regulatory scheme

The following violations are also very significant in the regulatory scheme and therefore require the assessment of the following penalties:

Work Practice Standard Violations:

-failure to perform a work practice requirement:

\$10,000-15,000

(See Appendix III for Asbestos NESHAP violations.)

Reporting and Notification Violations:

-failure to report or notify: \$15,000

-late report or notice: \$5,000

-incomplete report or notice: \$5,000 - \$15,000

(See Appendix III for Asbestos NESHAP violations.)

Recordkeeping Violations:

-failure to keep required records: \$15,000

-incomplete records: \$5,000 - \$15,000

Testing Violations:

-failure to conduct required performance testing or testing using an improper test method: \$15,000

-late performance test or performing a required test method using an incorrect procedure: \$5,000

Permitting Violations:

-failure to obtain an operating permit: \$15,000

-failure to pay permit fee: See Section 502(b)(3)(c)(ii) of the Act

Emission Control Equipment Violations:

- failure to operate and maintain control equipment required by the Clean Air Act, its implementing regulations or a permit: \$15,000
- intermittent or improper operation or maintenance of control equipment: \$5,000-15,000

Monitoring Violations:

- failure to install monitoring equipment required by the clean Air Act, its implementing regulations or a permit: \$15,000
- late installation of required monitoring equipment: \$5,000
- failure to operate and maintain required monitoring equipment: \$15,000

Violations of Administrative Orders: \$15,000

Section 114 Requests for Information Violations:

- failure to respond: \$15,000
- incomplete response: \$5,000 - \$15,000

Compliance Certification Violations:

- failure to submit a certification: \$15,000
- late certifications: \$5,000
- incomplete certifications: \$5,000 - \$15,000

Violations of Permit Schedules of Compliance:

- failure to meet interim deadlines: \$5,000
- failure to submit progress reports: \$15,000
- incomplete progress reports: \$5,000 - \$15,000
- late progress reports: \$5,000

A penalty range is provided for work practice violations to allow Regions some discretion depending on the severity of the violation. Complete disregard of work practice requirements should be assessed the full \$15,000 penalty. Penalty ranges are provided for incomplete notices, reports, and recordkeeping to allow the Regions some discretion depending on the seriousness of the omissions and how critical they are to the regulatory program. If the source omits information in notices, reports or records which document the source's compliance status, this omission should be treated as a failure to meet the requirement

and assessed \$15,000.

A late notice, report or test should be considered a failure to notify, report or test if the notice or report is submitted or the test is performed after the objective of the requirement is no longer served. For example if a source is required to submit a notice of a test so that EPA may observe the test, a notice received after the test is performed should be considered a failure to notify.

Each separate violation under this section should be assessed the corresponding penalty. For example, a NSPS source may be required to notify EPA at startup and be subject to a separate quarterly reporting requirement thereafter. If the source fails to submit the initial start-up notice and violates the subsequent reporting requirement, then the source should be assessed \$15,000 under this section for each violation. In addition, a length of violation figure should be assessed for each violation based on how long each has been violated. Also, a figure reflecting the size of the violator should be assessed once for the case as a whole. If, however, the source violates the same reporting requirement over a period of time, for example by failing to submit quarterly reports for one year, the source should be assessed one \$15,000 penalty under this section for failure to submit a report. In addition, a length of violation figure of \$15,000 for 12 months of violation and a size of the violator figure should be assessed.

3. Size of the violator

Net worth (corporations); or net current assets
(partnerships and sole proprietorships):

Under \$100,000	\$2,000	
\$100,001-\$1,000,000	5,000	
1,000,001-5,000,000	10,000	
5,000,001-20,000,000	20,000	
20,000,001-40,000,000	35,000	
40,000,001-70,000,000	50,000	
70,000,001-100,000,000	70,000	
over 100,000,000	70,000 + \$25,000 for every	additional
\$30,000,000 or	fraction thereof	

In the case of a company with more than one facility, the size of the violator is determined based on the company's entire

operation, not just the violator's facility. With regard to parent and subsidiary corporations, only the size of the entity sued should be considered. Where the size of the violator figure represents over 50% of the total preliminary deterrence amount, the litigation team may reduce the size of the violator figure to 50% of the preliminary deterrence amount.

The process by which the gravity component was computed must be memorialized in the case file. Combining the economic benefit component with the gravity component yields the preliminary deterrence amount.

4. Adjusting the Gravity Component

The second goal of the Policy on Civil Penalties is the equitable treatment of the regulated community. One important mechanism for promoting equitable treatment of the regulated community. One important mechanism for promoting equitable treatment is to include the economic benefit component discussed above in a civil penalty assessment. This approach prevents violators from benefitting economically from their noncompliance relative to parties which have complied with environmental requirements.

In addition, in order to promote equity, the system for penalty assessments must have enough flexibility to account for the unique facts of each case. Yet it still must produce consistent enough results to ensure similarly-situated violators are treated similarly. This is accomplished by identifying many of the legitimate differences between cases and providing guidelines for how to adjust the gravity component amount when those facts occur. The application of these adjustments to the gravity component prior to the commencement of negotiation yields the initial minimum settlement amount. During the course of negotiation, the litigation team may further adjust this figure based on new information learned during negotiations and discovery to yield the adjusted minimum settlement amount.

The purpose of this section is to establish adjustment factors which promote flexibility while maintaining national consistency. It sets guidelines for adjusting the gravity component which account for some factors that frequently distinguish different cases. Those factors are: degree of willfulness or negligence, degree of cooperation, history of noncompliance, and environmental damage. These adjustment

factors apply only to the gravity component and not to the economic benefit component. Violators bear the burden of justifying mitigation adjustments they propose. The gravity component may be mitigated only for degree of cooperation as specified in II.B.4.b. The gravity component may be aggravated by as much as 100% for the other factors discussed below: degree of willfulness or negligence, history of noncompliance, and environmental damage.

The litigation team is required to base any adjustment of the gravity component on the factors mentioned and to carefully document the reasons justifying its application in the particular case. The entire litigation team must agree to any adjustments to the preliminary deterrence amount. Members of the litigation team are responsible for ensuring their management also agrees with any adjustments to the penalty proposed by the litigation team.

a. Degree of Willfulness or Negligence

This factor may be used only to raise a penalty. The Clean Air Act is a strict liability statute for civil actions, so that willfulness, or lack thereof, is irrelevant to the determination of legal liability. However, this does not render the violator's willfulness or negligence irrelevant in assessing an appropriate penalty. Knowing or willful violations can give rise to criminal liability, and the lack of any negligence or willfulness would indicate that no addition to the penalty based on this factor is appropriate. Between these two extremes, the willfulness or negligence of the violator should be reflected in the amount of the penalty.

In assessing the degree of willfulness or negligence, all of the following points should be considered:

The degree of control the violator had over the events constituting the violation.

The foreseeability of the events constituting the violation.

The level of sophistication within the industry in dealing with compliance issues or the accessibility of appropriate control technology (if this information is readily available). This should be balanced against the

technology-forcing nature of the statute, where applicable.

The extent to which the violator in fact knew of the legal requirement which was violated.

b. Degree of Cooperation

The degree of cooperation of the violator in remedying the violation is an appropriate factor to consider in adjusting the penalty. In some cases, this factor may justify aggravation of the gravity component because the source is not making efforts to come into compliance and is negotiating with the agency in bad faith or refusing to negotiate. This factor may justify mitigation of the gravity component in the circumstances specified below where the violator institutes comprehensive corrective action after discovery of the violation. Prompt correction of violations will be encouraged if the violator clearly sees that it will be financially disadvantageous to litigate without remedying noncompliance. EPA expects all sources in violation to come into compliance, expects all sources in violation to come into compliance expeditiously and to negotiate in good faith. Therefore, mitigation based on this factor is limited to no more than 30% of the gravity component and is allowed only in the following three situations:

1. Prompt reporting of noncompliance

The gravity component may be mitigated when a source promptly reports its noncompliance to EPA or the state or local air pollution control agency where there is no legal obligation to do so.

2. Prompt correction of environmental problems

The gravity component may also be mitigated where a source makes extraordinary efforts to avoid violating an imminent requirement or to come into compliance after learning of a violation. Such efforts may include paying for extra work shifts or a premium on a contract to have control equipment installed sooner or shutting down the facility until it is operating in compliance.

3. Cooperation during pre-filing investigation

Some mitigation may also be appropriate in instances where the defendant is cooperative during EPA's pre-filing investigation of the source's compliance status or a particular incident.

c. History of Noncompliance

This factor may be used only to raise a penalty. Evidence that a party has violated an environmental requirement before clearly indicates that the party was not deterred by a previous governmental enforcement response. Unless one of the violations was caused by factors entirely out of the control of the violator, the penalty should be increased. The litigation team should check for and consider prior violations under all environmental statutes enforced by the Agency in determining the amount of the adjustment to be made under this factor.

In determining the size of this adjustment, the litigation team should consider the following points:

Similarity of the violation in question to prior violations.

Time elapsed since the prior violation.

The number of prior violations

Violator's response to prior violation(s) with regard to correcting the previous problem and attempts to avoid future violations.

The extent to which the gravity component has already been increased due to a repeat violation. (For example, under the Asbestos Demolition and Renovation Penalty Policy in Appendix III.)

A violation should generally be considered "similar" if a previous enforcement response should have alerted the party to a particular type of compliance problem. Some facts indicating a "similar violation" are:

Violation of the same permit.

Violation of the same emissions standard.

Violation at the same process points of a source.

Violation of the same statutory or regulatory provision.

A similar act or omission.

For purposes of this section, a "prior violation" includes any act or omission resulting in a State, local, or federal enforcement response (e.g., notice of violation warning letter, administrative order, field citation, complaint, consent decree, consent agreement, or administrative and judicial order) under any environmental statute enforced by the Agency unless subsequently dismissed or withdrawn on the grounds that the party was not liable. It also includes any act or omission for which the violator has previously been given written notification, however informal, that the regulating agency believes a violation exists. In researching a defendant's compliance history, the litigating team should check to see if the defendant has been listed pursuant to Section 306 of the Act.

In the case of large corporations with many divisions or wholly-owned subsidiaries, it is sometimes difficult to determine whether a prior violation by the parent corporation should trigger the adjustments described in this section. New ownership often raises similar problems. In making this determination, the litigation team should ascertain who in the organization exercised or had authority to exercise control or oversight responsibility over the violative conduct. Where the parent corporation exercised or had authority to exercise control over the violative conduct, the parent corporation's violations should be considered part of the subsidiary or division's compliance history.

In general, the litigation team should begin with the assumption that if the same corporation was involved, the adjustment for history of noncompliance should apply. In addition, the team should be wary of a party changing operations or shifting responsibility for compliance to different groups as a way of avoiding increased penalties. The Agency may find a consistent pattern of noncompliance by many divisions or subsidiaries of a corporation even though the facilities are at different geographic locations. This often reflects, at best, a corporate-wide indifference to environmental protection. Consequently, the adjustment for history of noncompliance should

apply unless the violator can demonstrate that the other violating corporate facilities are under totally independent control.

d. Environmental Damage

Although the gravity component already reflects the amount of environmental damage a violation causes, the litigation team may further increase the gravity component based on severe environmental damage. As calculated, the gravity component takes into account such factors as the toxicity of the pollutant, the attainment status of the area of violation, the length of time the violation continues, and the degree to which the source has exceeded an emission limit. However, there may be cases where the environmental damage caused by the violation is so severe that the gravity component alone is not a sufficient deterrent, for example, a significant release of a toxic air pollutant in a populated area. In these cases, aggravation of the gravity component may be warranted.

III. LITIGATION RISK

The preliminary deterrence amount, both economic benefit and gravity components, may be mitigated in appropriate circumstances based on litigation risk. Several types of litigation risk may be considered. For example, regardless of the type of violations a defendant has committed or a particular defendant's reprehensible conduct, EPA can never demand more in civil penalties than the statutory maximum (twenty-five thousand dollars per day per violation). In calculating the statutory maximum, the litigation teams should assume continuous noncompliance from the first date of provable violation (taking into account the five year statute of limitation) to the final date of compliance where appropriate, fully utilizing the presumption of Section 113(e)(2). When the penalty policy yields an amount over the statutory maximum, the litigation team should propose an alternative penalty which must be concurred on by their respective management just like any other penalty.

Other examples of litigation risks would be evidentiary problems, or an indictment from the court, mediator, or Administrative Law Judge during settlement negotiations that he or she is prepared to recommend a penalty below the minimum settlement amount. Mitigation based on the concerns should consider the specific facts, equities, evidentiary issues or

legal problems pertaining to a particular case as well as the credibility of government witnesses.

Adverse legal precedent which the defendant argues is indistinguishable from the current enforcement action is also a valid litigation risk. Cases raising legal issues of first impression should be carefully chosen to present the issue fairly in a factual context the Agency is prepared to litigate. Consequently in such cases, penalties should generally not be mitigated due to the risk the court may rule against EPA. If an issue of first impression is litigated and EPA's position is upheld by the court, the mitigation was not justified. If EPA's position is upheld by the court, the mitigation was not justified. If EPA's position is not upheld, it is generally better that the issue be decided than to avoid resolution by accepting a low penalty. Mitigation based on litigation risk should be carefully documented and explained in particular detail. In judicial cases this should be done in coordination with the Department of Justice.

IV. ABILITY TO PAY

The Agency will generally not request penalties that reach clearly beyond the means of the violator. Therefore, EPA should consider the ability to pay a penalty in adjusting the preliminary deterrence amount, both gravity component and economic benefit component. At the same time, it is important that the regulated community not see the violation of environmental requirements as a way of aiding a financially-troubled business. EPA reserves the option, in appropriate circumstances, of seeking a penalty that might contribute to a company going out of business.

For example, it is unlikely that EPA would reduce a penalty where a facility refuses to correct a serious violation. The same could be said for a violator with a long history of previous violations. That long history would demonstrate that less severe measures are ineffective.

The litigation team should assess this factor after commencement of negotiations only if the source raises it as an issue and only if the source provides the necessary financial information to evaluate the source's claim. The source's ability to pay should be determined according to the December 16, 1986 Guidance on Determining a Violator's Ability to Pay a Civil

Penalty (GM-56) along with any other appropriate means.

The burden to demonstrate inability to pay, as with the burden of demonstrating the presence of any other mitigating circumstances, rests on the defendant. If the violator fails to provide sufficient information, then the litigation team should disregard this factor in adjusting the penalty. The Office of Enforcement Policy has developed the capability to assist the Regions in determining a firm's ability to pay. This is done through the computer program, ABEL. If ABEL indicates that the source may have an inability to pay, a more detailed financial analysis verifying the ABEL results should be done prior to mitigating the penalty.

Consider delayed payment schedule with interest: When EPA determines that a violator cannot afford the penalty prescribed by this policy, the next step is to consider a delayed payment schedule with interest. Such a schedule might even be contingent upon an increase in sales or some other indicator of improved business. EPA's computer program, ABEL, can calculate a delayed payment amount for up to five years.

Consider straight penalty reductions as a last recourse: If this approach is necessary, the reasons for the litigation team's conclusion as the size of the necessary reduction should be carefully documented in the case file.⁶

Consider joinder of a corporate violator's individual owners: This is appropriate if joinder is legally possible and justified under the circumstances. Joinder is not legally possible for SIP cases unless the prerequisite of Section 113 of the Clean Air Act has been met -- issuance of an NOV to the person.

Regardless of the Agency's determination of an appropriate penalty amount to pursue based on ability to pay considerations, the violator is always expected to comply with the law.

V. OFFSETTING PENALTIES PAID TO STATE AND LOCAL GOVERNMENTS OR CITIZEN GROUPS FOR THE SAME VIOLATIONS

Under Section 113(e)(1), the court in a civil judicial action or the Administrator in a civil administrative action must consider in assessing a penalty "payment by the violator of penalties previously assessed for the same violation." While EPA

will not automatically subtract any penalty amount paid by a source to a State or local agency in an enforcement action or to a citizen group in a citizen suit for the same violation that is the basis for EPA's enforcement action, the litigation team may do so if circumstances suggest that it is appropriate. The litigation team should consider primarily whether the remaining penalty is a sufficient deterrent.

VI. SUPPLEMENTAL ENVIRONMENTAL PROJECTS

The February 12, 1991 Policy on the Use of Supplemental Environmental Projects in EPA Settlements must be followed when reducing a penalty for such a project in any Clean Air Act Settlement.

VII. CALCULATING A PENALTY IN CASES WITH MORE THAN ONE TYPE OF VIOLATION

EPA often takes an enforcement action against a stationary source for more than one type of violation of the Clean Air Act. The economic benefit of noncompliance with all requirements violated should be calculated. Next, the gravity component factors under actual or possible harm and importance to the regulatory scheme which are applicable should be calculated separately for each violation. The size of the violator factor should be figured only once for all violations.

For example, consider the case of a plant which makes laminated particle board. The particle board plant is found to emit particulate in violation of the SIP particulate emission limit and the laminating line which laminates the particle board with a vinyl covering is found to emit volatile organic compounds in violation of the SIP VOC emission limit. The penalty for the particulate violation should be calculated figuring the economic benefit of not complying with that limit (capital cost of particulate control, etc., determined by running the BEN computer model), and then the gravity component for this violation should be calculated using all the factors in the penalty policy. After the particulate violation penalty is determined, the VOC violation should be calculated as follows: the economic benefit should be calculated for the VOC violation using all the applicable factors under actual or possible harm and importance to the regulatory scheme. The size of the violator factor should be figured only once for both violations.

Another example would be a case where, pursuant to Section 114, EPA issues a request for information to a source which emits SO₂, such as a coal-burning boiler. The source does not respond. Two months later, EPA issues an order under Section 113(a) requiring the source to comply with the Section 114 letter. The source does respond. Three months later, EPA inspects the source and determines that the source is violating the SIP SO₂ emission limit.

In this case, separate economic benefits should be calculated, if applicable. Thus, if the source obtained any economic benefit from not responding to the Section 114 letter or obeying the Section 113(a) order, that should be calculated. If not, only the economic benefit from the SO emission violation should be calculated using the BEN computer model. In determining the gravity component, the penalty should be calculated as follows:

1. Actual or possible harm

- a. level of violation - calculate for the emission violation only
- b. toxicity of pollutant - applicable to the emission violation only
- c. sensitivity of environment - applicable to the emission violation only
- d. length of time of violation - separately calculate the time for all three violations. Note the Section 114 violation continues to run even after the Section 113(e) order is issued until the Section 114 requirements are satisfied.

2. Importance to regulatory scheme

Section 114 request for information violation - \$15,000
Section 113 administrative order violation - \$15,000

3. Size of violator

- a. One figure based on the source's assets.

VIII. APPORTIONMENT OF THE PENALTY AMONG MULTIPLE DEFENDANTS

This policy is intended to yield a minimum settlement

penalty figure for the case as a whole. In many cases, there may be more than one defendant. In such instances, the Government should generally take the position of seeking a sum for the case as a whole, which the defendants allocate among themselves. Civil violations of the Clean Air Act are strict liability violations and it is generally not in the government's interest to get into discussions of the relative fault of the individual defendants. The government should therefore adopt a single settlement figure for the case and should not reject a settlement consistent with the bottom line settlement figure because of the way the penalty is allocated.

Appointment of the penalty in a multi-defendant case may be required if one party is willing to settle and others are not. In such circumstances, the government should take the position that if certain portions of the penalty are attributable to such party (such as economic benefit or aggravation due to prior violations), that party should pay those amounts and a reasonable portion of the amounts not directly assigned to any single party. If the case is settled as to one defendant, a penalty not less than the balance of the settlement figure for the case as a whole must be obtained from the remaining defendants.

There are limited circumstances where the Government may try to influence apportionment of the penalty. For example, if one party has a history of prior violations, the Government may try to assure that party pays the amount the gravity component has been aggravated due to the prior violations. Also, if one party is known to have realized all or most of the economic benefit, that party may be asked to pay that amount.

IX. EXAMPLES

Example 1

I. Facts:

Company A runs its manufacturing operations with power produced by its own coal-fired boilers⁷. The boilers are major sources of sulfur dioxide. The State Implementation Plan has a sulfur dioxide emission limitation for each boiler of .68 lbs. Per million B.T.U. The boilers were inspected by EPA on March 19, 1989, and the SO₂ emission rate was 3.15 lbs. Per million B.T.U for each boiler. A NOV was issued for the SO₂ violations on April 10, 1989. EPA again inspected Company A on June 2, 1989

and found the SO₂ emission rate to be unchanged. Company A had never installed any pollution control equipment on its boilers, even though personnel from the state pollution control agency had contacted Company A and informed it that the company was subject to state air pollution regulations. The state had issued an administrative order on September 1, 1988 for SO₂ emission violations at the same boilers. The order required compliance with applicable regulations, but Company A had never complied with the state order. Company A is located in a nonattainment area for sulfur oxides. Company A has net current assets of \$760,000. Company A's response to an EPA Section 114 request for information documented the first provable day of violation of the emission standard as July 1, 1988.

II. Computation of penalty

A. Economic benefit component

EPA used the BEN computer model in the standard mode to calculate the economic benefit component. The economic benefit component calculated by the computer model was @243,500.

B. Gravity component

1. Actual or possible harm

- a. Amount of pollutant: between 360-390%
above standard - \$65,000
- b. Toxicity of pollutant: not applicable.
- c. Sensitivity of the environment: nonattainment -
\$10,000
- d. Length of time of violation: Measured
from the date of first provable
violation, July 1, 1988 to the date of
final compliance under a consent decree,
hypothetically December 1, 1991. (If
consent decree or judgment order is
filed at a later date, this element, as
well as elements in the economic benefit
component must be recalculated.) 41 mos.
- \$40,000

2. Importance to regulatory scheme.

No applicable violations.

3. Size of violator: net assets of \$760,000 - \$5,000

\$243,500 economic benefit component
+120,000 gravity component
\$363,500 preliminary deterrence amount

C. Adjustment Factors

1. Degree of willfulness/negligence

Because Company A was on notice of its violations and, moreover, disregarded the state administrative order to comply with applicable regulations, the gravity component in this example should be aggravated by some percentage based on this factor.

2. Degree of Cooperation

No adjustments were made in the category because Company A did not meet the criteria.

3. History of noncompliance

The gravity component should be aggravated by some percentage for this factor because Company A violated the state order issued for the same violation.

Initial penalty figure: \$353,500 preliminary deterrence amount plus adjustments for history of noncompliance and degree of willfulness or negligence.

Example 2:

I. Facts

Company C, located in a serious nonattainment area for particulate matter, commenced construction in January 1988. It began its operations in April 1989. It runs a hot mix asphalt

plant subject to the NSPA regulations at 40 C.F.R. Part 60, Subpart I. Subpart I requires that emissions of particulate not exceed 90 mg/dscm (.04 gr/dscf) nor exhibit 20% opacity or greater. General NSPS regulations require that a source owner or operator subject to a NSPS fulfill certain notification and recordkeeping functions (40 C.F.R. § 60.7), and conduct performance tests and submit a report of the test results (40 C.F.R. § 60.8).

Company C failed to notify EPA of: the date it commenced construction within 30 days after such date (February 1988)(40 C.F.R. § 60.7(a)(1)); the date of anticipated start-up between 30-60 days prior to such date (March, 1989)(40 C.F.R. § 60.7(a)(2)); or the date of actual start-up within 15 days after such date (April, 1989) (40 C.F.R. § 60.7(a)(3). Company C was required under 40 C.F.R. § 60.8(a) to test within 180 days of start-up, or by October 1989. The company finally conducted the required performance test in September 1990. The test showed the plant to be emitting 120 mg/dscm of particles and to exhibit 30% opacity.

Company C did submit the required notices in November 1989 in response to a letter from EPA informing it that it was subject to NSPS requirements. It did negotiate with EPA after the complaint was filed in September 1991, and agreed to a consent decree requiring compliance by December 1, 1991. Company C has assets of \$7,000,000.

II. Computation of penalty

A. Benefit component

The Region determined after calculation that the economic benefit component was \$90,000 for violation of the emissions standard according to the BEN computer calculation. The litigation team determined that the economic benefit from the notice and testing requirement was less than \$5,000. Therefore, the litigation team has discretion not to include this amount in the penalty consistent with the discussion at II.A.3.a.

B. Gravity component

1. Actual or possible harm

a. Actual of pollutant:

- I. mass emission standard: 33% above standard - \$10,000
- ii. opacity standard: 50% over standard - \$10,000

b. Toxicity of pollutant: not applicable

c. Sensitivity of the environment serious nonattainment - \$14,000

d. Length of time of violation

- 1) Performance testing: October, 1989 - September 1990: 12 months - \$15,000
- 2) Failure to report commencement of construction: February 1988 - November 1989: 21 months (date of EPA's first letter to Company) - \$25,000
- 3) Failure to report actual start-up: April, 1989 - November 1989: 7 months - \$15,000
- 4) Failure to report date of anticipated startup between 30-60 days prior to such date: March, 1989 - November 1989: 8 months - \$15,000
- 5) Mass Emission Standard Violation: September 1990 - December 1991: 15 months - \$20,000
- 6) Opacity Violation: September 1990 - December 1991: 15 months - \$20,000

2. Importance to regulatory scheme:

Failure to notify 40 C.F.R. § 60.7(a)(1) -	\$15,000
Failure to notify 40 C.F.R. § 60.7(a)(2) -	
\$15,000	

Failure to notify 40 C.F.R. § 60.7(a)(3) -
\$15,000

Failure to conduct required performance test
40 C.F.R. § 60.8(a) - \$15,000

3. Size of violator: Net current Assets -
\$7,000,000 - \$20,000

\$ 90,000 economic benefit component
224,000 gravity component
\$314,000 preliminary deterrence amount

C. Adjustment factors

1. Degree of willfulness/negligence

No adjustments were made based on willfulness in this category because there was no evidence that Company C knew of the requirements prior to receiving the letter from EPA. Specific evidence may suggest that the company's violations were due to negligence justifying an aggravation of the penalty on that basis.

2. Degree of Cooperation

No adjustments were made in this category because Company C did not meet the criteria.

3. History of noncompliance

The gravity component should be aggravated by an amount agreed to by the litigation team for this factor because the source ignored two letters from EPA informing them of the requirements.

Example 3:

I. Facts

Chemical Inc. Operates a mercury cell chlor-alkali plant which produced chlorine gas. The plant is subject to regulations under the National Emissions Standard for Hazardous Air Pollutants (NESHAP) for mercury, 40 C.F.R. Part 61, Subpart E. On September 9, 1990, EPA inspectors conducted an inspection of

the facility, and EPA required the source to conduct a stack test pursuant to Section 114. The stack test showed emissions at a rate of 3000 grams of mercury per 24-hour period. The mercury NESHAP states that emissions from mercury cell chlor-alkali plants shall not exceed 2300 grams per 24-hour period. The facility has been in operation since June 1989.

In addition under 40 C.F.R. § 61.53, Chemical Inc. Either had to test emissions from the cell room ventilation system within 90 days of the effective date of the NESHAP or follow specified approved sign, maintenance and housekeeping practices. Chemical Inc. has never tested emissions. Therefore, it has committed itself to following the housekeeping requirements. At the inspection, EPA personnel noted the floors of the facility were badly cracked and mercury droplets were found in several of the cracks. The inspectors noted that the mercury in the floor cracks was caused by leaks from the hydrogen seal pots and compressor seals which housekeeping practices require be collected and confined for further processing to collect mercury. A follow up inspection was conducted on September 30, 1990 and showed that all of the housekeeping requirements were being observed.

Chemical Inc. will have to install control equipment to come into compliance with the emissions standard. A complaint was filed in June 1991. The equipment was installed and operational by June 1992. A consent decree was entered and penalty paid in February 1992. Chemical Inc. has a net corporate worth of \$2,000,000.

II. Calculation of Penalty

A. Economic Benefit Component

the delay in installing necessary control equipment from June 1989 to June 1992 as calculated using the BEN computer model resulted in an economic benefit to Chemical Inc. Of \$35,000.

B. Gravity Component

1. Actual or possible harm

- a. Amount of pollutant: 30 % above the standard - \$5,000

b. Toxicity of pollutant: \$15,000 for violations involving a NESHAP

c. Sensitivity of the environment: not applicable

d. Length of time of violation:

1) Emissions violation: 22 mos. - \$25,000

2) Work Practice violation: 1 mo. - \$5,000

2. Importance to regulatory scheme.

Failure to perform work practice requirements
- \$15,000

3. Size of Violator: net worth of \$2,000,000 - \$10,000

\$35,000 economic benefit component
+75,000 gravity component
\$110,000 preliminary deterrence amount

C. Adjustment Factors

1. Degree of willfulness/negligence

It is unlikely Chemical Inc. would not be aware of the NESHAP requirements. Therefore, an adjustment should probably be made for this factor.

2. Degree of Cooperation

No adjustments made because Chemical Inc. Did not meet the criteria.

3. History of Compliance

No adjustments were made because Chemical Inc. Had no prior violations.

X. CONCLUSION

Treating similar situations in a similar fashion is central to the credibility of EPA's enforcement effort and to the success of achieving the goal of equitable treatment. This document has established several mechanisms to promote such consistency. Yet it still leaves enough flexibility for tailoring the penalty to particular circumstances. Perhaps the most important mechanisms for achieving consistency are the systematic methods for calculating the benefit component and gravity component of the penalty. Together, they add up to the preliminary deterrence amount. The document also sets out guidance on uniform approaches for applying adjustment factors to arrive at an initial amount prior to beginning settlement negotiations or an adjusted amount after negotiations have begun.

Nethertheless, if the Agency is to promote consistency, it is essential that each case file contain a complete description of how each penalty was developed as required by the August 9, 1990 Guidance on Documenting Penalty Calculations and Justifications in EPA Enforcement Actions. This description should cover how the preliminary deterrence amount was calculated and any adjustments made to the preliminary deterrence amount. It should also describe the facts and reasons which support such adjustments. Only through such complete documentation can enforcement attorneys, program staff and their managers learn from each other's experience and promote the firmness required by the Policy on Civil Penalties.

FOOTNOTES

1. In these actions, EPA will normally seek the penalty amount dictated by the stipulated penalty provisions of the consent decree. If a consent decree contains no stipulated penalty provisions, the case development team should propose penalties suitable to vindicate the authority of the Court.
2. With respect to civil judicial cases, the litigation team will consist of the Assistant Regional Counsel, the Office of Enforcement attorney, the Assistant United States Attorney, the Department of Justice attorney from the Environmental Enforcement Section, and EPA technical professional assigned to the case. With respect to administrative cases, the litigation team will generally consist of the EPA technical professional and Assistant Regional Counsel assigned to the case. The recommendation of the litigation team must be unanimous. If a unanimous position cannot be reached, the matter should be escalated and a decision made by EPA and the Department of Justice managers, as required.
3. Compliance is equivalent to 0% above the emission standard.
4. An example of a non-NESHAP violation involving a hazardous air pollutant would be a violation of a volatile organic compound (VOC) standard in a State Implementation Plan involving a VOC contained in the Section 112(b)(1) list of pollutants for which no NESHAP has yet been promulgated.
5. This figure should be assessed even if the violation of the administrative order is also a violation of another requirement of the Act, for example a NESHAP or NSPS requirement. In this situation, the figure for violation of the administrative order is in addition to appropriate penalties for violating the other requirement of the Act.
6. If a firm fails to pay the agreed to penalty in a final administrative or judicial order, then the Agency must follow the procedures outlined in the February 6, 1990 Manual on Monitoring and Enforcing Administrative and Judicial Orders for collecting the penalty amount.
7. Note that a penalty is assessed for the entire facility and not for each emission unit. In this example, the source has several boilers. However, the penalty figures are not multiplied by the number of boilers. The penalty is based on the violations

at the facility as a whole, specifically the amount of pollutant factor and length of violation factor are assessed once based on the amount of excess emissions at the facility from all the boilers.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D.C. 20460

JAN 17 1992

MEMORANDUM

SUBJECT: Clarification to the October 25, 1991 Clean Air Act
Stationary Source Civil Penalty Policy

FROM: John B. Rasnic, Director (Signature)
Stationary Source Compliance Division
Office of Air and Radiation

Michael S. Alushin, Enforcement Counsel (Signature)\
Air Enforcement Division
Office of Enforcement

TO: Addressees

As a result of the many comments and suggestions received during the Administrative Enforcement Training in Chicago on November 5-6, 1991, we would like to clarify several issues regarding the October 25, 1991 Clean Air Act Stationary Source Civil Penalty Policy. In addition to the addresses, we are distributing this clarification memorandum to all those who attended the training in Chicago.

We would like to clarify that the toxicity of pollutant and sensitivity of the environment figures of the gravity component apply only to violations of emissions standards and to work practice or technology standards that are serving as emissions standards. In addition, the length of violation figure of the gravity component is based on the number of actual days of violation, not calendar months. The number of actual days of violation should be counted and divided by thirty to determine the number of months. Any portion of a thirty day period should be counted as another month. In addition, any days over a calendar year should be counted as another month (i.e., 368 days should be counted as 13 months).

Several Regions questioned which enforcement forum would be appropriate where a portion of the violation occurred over twelve

months from the initiation of the enforcement action. In determining whether the action may be pursued administratively, EPA may never drop viable causes of action. However, if some portion of the alleged violations occurred over 12 months prior to filing of the complaint, the portion of those violations which occurred over 12 months prior to filing of the complaint may be disregarded and the case may be pursued administratively with the following qualification. This can only be done where no causes of action are dropped and the resulting preliminary deterrence amount (PDA) is at least 90% of the PDA calculated with the entire length of all violations included.

One Region suggested that Headquarters adopt an air-specific Supplemental Environmental Projects (SEP) policy. Both the Stationary Source Compliance Division (SSCD) and Air Enforcement Division (AED) will work next year to develop such a policy which will include examples of appropriate air SEPs. Supplemental Environmental Projects which are appropriate under the current Office of Enforcement guidance may be included in consent agreements and final orders (CAFOs) in administrative actions. As one Region suggested, this could be done by conditionally remitting a portion of an assessed penalty by requiring in the CAFO that the defendant pay that portion offset by the SEP unless all the actions required by the SEP are performed by a certain date. The burden is always on the defendant to establish that the SEP has been fully complied with. Actions which the respondent must take to come into compliance can not be addressed in the CAFO but must be addressed through 113(a) administrative compliance orders or a civil judicial action under 113(b) in accordance with the October 29, 1991 "Guidance on Choosing the Appropriate Forum in Clean Air Act Stationary Source Civil Enforcement."

The penalty policy requires that members of the litigation team are responsible for ensuring their management agrees with any adjustment to the PDA. We would like to emphasize that each member of the litigation team must keep formal documentation of management concurrence in his or her case file. The documentation of management concurrence must include a signature on the penalty calculation worksheet (or similar document) by the first line supervisor of the team members.

Finally, attached are three replacement pages which correct Example 3. The original example incorrectly left out a length of violation figure for the work practice violation. The

appropriate length of violation figure should always be assessed for each violation.

Several suggestions which were made have not yet been adopted but are under consideration. We will evaluate the implementation of the revised penalty policy after one year. To the extent changes in the policy are warranted, we will reconsider the unincorporated suggestions at that time.

Several Regions disagreed with Example 1 in the policy because it only calculates the gravity component once even though the emissions standard applies to each individual boiler and was violated at several boilers at the same facility. The Regions believed the gravity component should be calculated separately for each violation at each boiler. SSCD and AED have decided to maintain the position that in instances where a particular regulation applies to each individual emissions unit and the standard is violated at several emissions units, the gravity component is calculated only once for the entire facility. The main reason for this is a concern that calculating for each emissions unit separately would lead to unrealistically high penalties. Nonetheless, several factors will result in a higher penalty for these multiple unit violations. The economic benefit as calculated by BEN should be significantly higher if the standard is being violated at more than one emissions unit. The level of violation figure of the gravity component will also generally be higher if the standard is being violated at more than one emissions unit. Of course, the violation at each boiler would be separately alleged in the complaint.

One Region suggested that the policy should allow the litigation team to mitigate the gravity component by as much as 15% for degree of cooperation anytime the defendant is willing to settle. The penalty policy still takes the position that EPA expects every source to negotiate in good faith and come into compliance expeditiously and doing so does not justify mitigation. The litigation team still has room to negotiate under the policy. The penalty pleaded in the administrative complaint is generally the unmitigated preliminary deterrence amount. Therefore, any mitigation justified under the policy may take place during negotiations to reach a settlement. Also, the penalty pleaded in the administrative complaint is to be based on the most aggressive assumptions supported by the facts available at that time concerning such factors as length of violation and level of violation. These factors may be recalculated if

defendants demonstrate that they are inaccurate.

If you have any questions about these changes, please contact us or Scott Throwe in SSCD at FTS 678-8699 or Elise Hoerath in AED at FTS 260-2843 or (202) 260-2843.

Attachment

Addresses: Regional Administrators, Regions I-X

Regional Counsels, Regions I-X

Air Management Division Director
Region I

Air and Waste Management Division Director
Region II

Air, Toxics and Radiation Management Division
Director
Region III

Air, Pesticides, and Toxics Management Division
Director
Region IV

Air and Radiation Division Director
Region V

Air, Pesticides, and Toxics Division Director
Region VI

Air and Toxics Division Director
Regions VII, VIII, IX and X

Bruce Rothrock, OCAPO

Robert Heiss, OCAPO

Jonathan Libber, OCAPO

John Cruden, Chief
Environmental Enforcement Section
U.S. Department of Justice

Bill Becker
STAPPA-ALAPCO

cc: Scott S. Fulton
Acting Deputy Assistant Administrator
Office of Enforcement

Robert Van Huevelen
Acting Director of Civil Enforcement

John Seitz, Director
Office of Air Quality Planning and Standards

APPENDIX I

Penalty Policy for Violations of Certain Clean Air Act Permit Requirements for the Construction or Modification of Major Stationary Sources of Air Pollution

I. Introduction

EPA's Clean Air Act Stationary Source Civil Penalty Policy applies generally to stationary sources of air pollution which violate requirements enforceable under Section 113 of the Clean Air Act when such violations are the result of a failure to make capital expenditures and or failure to employ operation and maintenance procedures which are necessary to achieve compliance. The general policy does not, however, specifically address violations of permit requirements related to the construction or modification of major stationary sources under the prevention of significant deterioration (PSD) program and the nonattainment area new source review program.

This document outlines a penalty policy which applies to certain permit-related violations of the Clean Air Act and provides a method of calculating a minimum settlement amount for such violations. This "Permit Penalty Policy" was originally issued in February 1981 to deal with a subject area not covered by the 1980 penalty policy. It has been revised for inclusion in the-1987 policy to reflect more realistic penalty amounts.

As illustrated by the examples, a source may have violated a new source requirement which makes it subject to this Permit Penalty Policy, and, in addition, violated a regulation subject to the general policy or another appendix. If this is the case, the Permit Penalty Policy should be used to find the minimum settlement figure for the permit violation(s) and the general policy or applicable appendix should be used to establish a penalty amount for the other violation(s). These two figures should be added together to produce an appropriate overall settlement amount. It is also important to note that the policy outlined in this document, Like the general stationary source civil penalty policy, is used to set a minimum settlement figure. Therefore, the penalty actually negotiated for can always be higher than the figure derived through use of this Permit Penalty Policy.

II. The Permit Penalty Policy

The Permit Penalty Policy covers cases involving a sources which begin construction or operation without first obtaining the required PSD or nonattainment new source permit, as well as those which construct or operate in violation of such valid permits. Construction proceeding in compliance with an invalid permit is considered to be, in the context of thin penalty policy, construction without a permit.

In these cases, when the source is operating and has enjoyed an economic benefit from noncompliance, that benefit -should be calculated as directed in the general stationary source civil penalty policy. As directed by the general policy, however, the Regional Office may decide not to calculate the economic benefit if that office decides that the economic benefit is likely to be below \$5,000. The gravity component is then calculated based on the matrix contained in this permit penalty policy. Construction in the absence of a permit or in violation of a permit has been assigned a scale of dollar values on a matrix. The matrix also provides for the assessment of an additional penalty for certain specified violations of substantive permit preconditions or requirements. The appropriate dollar value for a violation is dependent on an estimate of the total cost of air pollution control at those facilities of the source for which the permit is required.^{1/} This value is then multiplied by the number of months of violation.^{2/} When there are multiple permit-related violations, a penalty figure is calculated for each violation and the individual penalty figures are added together to produce one minimum settlement figure. In those cases where a source subject to a valid permit violates only the requirements of Section 173(1) and/or Section 173(3) (requirements for construction permits in nonattainment areas), the appropriate penalty amount is determined by reference only to the matrix column(s) citing the violation(s).

The economic benefit component and the gravity component are added together to determine the preliminary deterrence amount. This initial amount should then be adjusted, using the general stationary source civil penalty policy factors which take into consideration individual equitable considerations -(Part III of the general policy.) This will yield the initial penalty figure.

The period of civil penalty liability will, of course, depend upon the nature and circumstances of the violation. For example, if a source has begun actual construction without a required permit or under an invalid permit, the penalty period

begins on the date the source began construction and continues either until the source obtains a valid permit, notifies the State or EPA that it has permanently ceased construction and the project has been abandoned, or the State issues a federally enforceable construction permit containing operating restrictions which keep the source below the new source review applicability threshold.^{3/} A temporary cessation in construction does not toll the running of the penalty period. The Agency may, however, consider mitigation of the calculated civil penalty if a source ceases construction within a reasonable time after being notified of the violation and does not resume construction until a valid permit is issued. If a source violates a permit condition, the period of penalty liability for purposes of calculating a settlement figure begins on the first date the violation can be documented and will cease when the violation is corrected.

EPA realizes that in certain cases, it is highly unlikely that the Agency will be able to obtain the full amount of the initial penalty figure in litigation. This may be due to applicable precedent, competing public interest considerations, or the specific facts, equities, or evidentiary issues pertaining to a particular case. In such a situation it is unrealistic to expect EPA to obtain a penalty settlement which it could not achieve through litigation. The litigation team must receive the approval of the Associate Enforcement Counsel for Air in order to propose settling for less than the minimum penalty amount from the matrix because of litigation practicalities.

PERMIT PENALTY POLICY MATRIX
MINIMUM SETTLEMENT FIGURES
(per month of violation)

PSD SOURCES

TOTAL COST OF AIR
POLLUTION CONTROL
FOR NEW OR MODIFIED
SOURCE (\$ THOUSANDS)
CONSTRUCTION OR
OPERATION WITHOUT A
PERMIT OR IN
VIOLATION OF A VALID
PERMIT
INCREMENT
EXCEEDED

less than 50
50-150
150-500
500-1,500
1,500-5,000
5,000-15,000
15,000-50,000
over 50,000
\$2,000
4,000
7,000
11,000
16,000
22,000
29,000
37,000
\$7,000
11,000
16,000
18,000
2,000
25,000
31,000

39,000

PART D AND OFFSET INTERPRETATIVE RULING SOURCES

TOTAL COST OF
AIR POLLUTION
CONTROL FOR
NEW OR
MODIFIED
SOURCE (\$
THOUSANDS)
CONSTRUCTION
OR OPERATION
WITHOUT A
PERMIT OR IN
VIOLATION OF A
VALID PERMIT
FAILURE TO
SATISFY §
173(1) OR
OBTAIN OFFSETS
VIOLATION OF
SECTION 173(3)
OR CONDITION 2

less than 50
50-100
150-500
500-1,500
1,500-5,000
5,000-15,000
15,000-50,000
over 50,000
\$2,000
4,000
7,000

11,000
16,000
22,000
29,000
37,000
\$3,000
4,000
6,000
9,000
11,000
13,000
15,000
17,000
\$2,000
3,000
4,000
4,000
5,000
7,000
11,000
12,000

(Add numbers when multiple categories apply)

EXAMPLE CASES

The following hypothetical cases illustrate how the matrix is used to calculate a minimum settlement figure.

PSO SOURCE

I. Facts

On July 1, 1985, an existing major source began construction of a modification to its plywood manufacturing plant. The modification will result in a significant net emission increase of particulate matter. The source had not obtained or filed for a PSD permit as of the date construction began.

On July 2, 1985, EPA investigators discovered the construction during a routine inspection of the plywood plant. The EPA Regional Office determined that the modification was subject to PSD review and issued a Notice of Violation on August 1, 1985. The NOV cited the PSD regulations and outlined possible enforcement alternatives.

The source received the NOV on August 5, 1985, and contacted the Regional Office on August 10, 1985. On August 30, 1985, the Region and the source held a conference at which the source stated that it had been aware of the need for PSD review and permitting prior to construction. The source also stated that it would file an application for a permit but that it would not cease construction during the review process.

On October 1, 1985, the source filed a PSD application. During the review process the Region discovered that the source had no plans to install pollution control devices. The Region also determined that without BACT, the modification's particulate emissions would result in an exceedance of the particulate matter increment in the source's area of impact. The source, when informed of the BACT problem, indicated it would install the necessary controls.

However, throughout the review process the source continued construction of the modification. On December 1 1985, the source began operation of the modified source without the required permit and without controls.

On January 15, 1986; the source was issued a PSD permit. On

February 28, 1986, the source ceased operation of the plywood plant to connect the pollution control equipment called for in the PSD permit. The source resumed operation on March 15, 1986 in a manner consistent with the PSD permit conditions.

II. Computation of Penalty

A. Benefit Component

The penalty calculation begins with a calculation of the economic benefit of noncompliance (using the BEN model) for the period of operation without a permit (December 1, 1985 -January 15, 1986). BEN calculated a penalty of \$6,400.

B. Gravity Component

This component of the penalty is calculated by initially assessing the total cost of air pollution control equipment at the modification. For purposes of this example, assume BACT costs \$140,000.

Next, the PSD Matrix must be consulted and the type and number of matrix categories determined. In this example the source (1) began construction without a permit, (2) operated the plant without a PSD permit and (3) exceeded the growth increment for particulate matter. Therefore, this source is subject to both of the columns of dollar values under the heading "PSD Sources."

Once the type, number and dollar values of the penalty are determined, these figures are multiplied by the number of months in violation. The sums are then added together to produce the matrix penalty amount.

In this example, the source's period of construction without a permit runs from July 1, 1985, until operations began on December 1, 1985 (5 months). The period of operation without a permit runs from the time the source began operation (December 1, 1985) to the date the source received a permit (January 15, 1986) (2 months). The source also exceeded the area growth increment for particulate matter during the period of operation from December 1, 1985, to February 28, 1986 (3 months).^{4/}

The matrix penalty figure for this source's PSD related violations, based on a \$140,000 total cost of control estimate, is :

for the 5 month period of construction without a permit, $5 \times \$4,000 = \$20,000$

- for the 2 month period of operation without a permit, $2 \times \$4,000 = \$8,000$

for the 3 month period of operation during which the increment was exceeded, $3 \times \$11,000 = \$33,000$

matrix penalty figure =
 $\$20,000 + \$8,000 + \$33,000 = \$61,000$

This is added to the economic benefit component

\$ 6,400 economic benefit
61,000 gravity
\$67,400 preliminary deterrence amount.

C. Adjustment Factors

1. Degree of willfulness/negligence

Because the source knew it needed a PSD permit and commenced construction without applying for a PSD permit, the gravity component is increased 10%

$10\% \text{ of } \$61,000 = \$6,100$

2. Degree of cooperation

No adjustment

3. History of noncompliance

No past history-of noncompliance

4. Ability to pay

No adjustment here because the source did not provide EPA with financial information indicating inability to pay.

Total Penalty

\$67,400 preliminary deterrence amount
+ 6,100 adjustment
\$73,500 initial minimum penalty figure

The source paid the U.S. Treasury 573,500.

Section 173 and Offset Policy Sources

I. Facts

On December 1, 1984, a plywood manufacturing company began operation of a modification at its plant which is located in a nonattainment area for particulate matter. The modification is subject to new source review permitting and, in fact, the source has obtained a valid NSR permit from the ~ State. The permit specifies 1) that the applicant has demonstrated that all other major stationary source owned or operated by the applicant in the State are in compliance with the Act, 2) what constitutes required LAER, and 3) what offsets (internal)5/.would be required to be obtained prior to start-up or commencement of operation. (These requirements are found in Section 173 of the Clean Air Act.)

In March of 1985, the Regional Office learned that the source did not install controls on a certain piece of process equipment and therefore did not have LAER as specified in the State permit. On April 1, 1985, the Region issued an NOV for failure to comply with the terms of the permit by not installing LAER prior to start-up. At an April 15, 1985, conference between EPA and the source, the source agreed to meet the terms of its permit and to demonstrate compliance. On November 15, 1985, the equipment had been installed and a performance demonstration showed that the source was in compliance-with the LAER limit specified in the permit.

II. Computation of Penalty

A. Benefit Component

The BEN model determined that the economic benefit from operating without LAER controls from December 1, 1984 until November 15, 1985 was \$63,400.

B. Gravity Component

First the cost of the pollution control equipment must be determined. In this case, LAER costs \$110,000. Since the plant operated from December-1, 1984 until November 15, 1985 without LAER, the period of violation is 12 months. The matrix yields a gravity component of $12 \times 4,000 = \$48,000$. The other two categories of the NSR matrix need not be used because there were no violations in these categories.

The gravity component is added to the economic benefit component

\$63,000 economic benefit
+ 48,000 gravity
\$111,400 preliminary deterrence amount

C. Adjustment factors

1. Degree of willfulness

No adjustment here. At the NOV conference, EPA learned that the company had had serious, but temporary economic reverses that prevented it from installing the control equipment.

2. Degree of cooperation

No adjustments here.

3. History of compliance

No past history of noncompliance.

4. Ability to pay

No adjustment here because the company had reversed its financial losses and was currently financially healthy.

Total penalty - initial penalty target figure same as preliminary deterrence amount.

Because the State had intervened in the case and had gathered the evidence of violation, the U.S. split the penalty with the State.

The Company paid \$55,700 to the U.S. treasury ant \$55,700 to the State.

FOOTNOTES

1/ "Total cost of air pollution control" should include, where relevant, pollution control equipment costs, design costs, operation and maintenance costs, differential cost of complying fuel v. noncomplying fuel, and other costs pertaining to adequate control of the new source. Total cost is to be determined by examination of what would have been required as BACT (for a PSD violation) or LAER (in the case of an Offset Policy or Part D violation). When construction is done in phases, the operative amount is the total cost of air pollution controls for the entire project. If a source has installed partial control before the enforcement action commenced, that part of the cost can be subtracted from the total costs.

2. Month-by-month accrual of penalties was selected for purposes of convenience and for consistency with the general policy. Any fraction of a month of violation is counted as a full month of violation unless circumstances present a case for mitigation this rule.

3. The period of liability is not to be confused with the period of continuing violation for Section 113 notice of violation (NOV) purposes. A source which constructs without a valid permit is in continuing violation of the Clean Air Act for NOV purposes until it receives a valid permit or it dismantles the new construction.

4. It is important to note that some aspects of the matrix do not necessarily track the statutory provision regarding violations. For example, there is no Clean Air Act provision which makes increment exceedance, in and of itself, a violation by an individual source. (The SIP must protect the increment. The method used in PSD review with permit conditions such as BACT, fuel use limitations, etc.) However, as a portion of the gravity component, considering the seriousness of the violation if a source operates and thereby violates the increment due to failure to go through PSD review as required, and added penalty in appropriate.

5. In light of the Supreme Court decision in *Chevron U.S.A. Inc. v. NRDC*, ___ U.S. ___, 104 S. Ct. 2778 (1984), a state may choose to adopt a plant-wide definition of source in nonattainment areas. In such instances, sources obtaining internal offsets may be exempt from nonattainment new source review requirements.

APPENDIX II

Vinyl Chloride Civil Penalty Policy

The attached chart shall be used to determine the gravity component of the civil penalty settlement amount for cases enforcing the National Emission Standard for Vinyl Chloride. It is to be used in Lieu of the scheme for determining the gravity component set forth in the general Clean Air Act Stationary Source Civil Penalty Policy.

The settlement penalty for vinyl chloride cases, as for other Clean Air Act cases, consists of a gravity component and an economic benefit component. Adjustments for degree of willfulness or negligence, degree of cooperation/noncooperation, history of noncompliance, ability to pay, "other unique factors," and litigation practicalities should be made, if appropriate, in accordance with the Stationary Source Civil Penalty Policy.

The gravity component of the penalty reflects the seriousness of the violation. A separate scheme was developed for vinyl chloride cases because several of the factors in the general policy, such as length or time of violation, whether the area is primary non-attainment, and level of violation as a percentage above the standard largely do not apply to vinyl chloride cases. Also, the hazardous nature of the pollutant and the difficulty in determining economic benefit are reflected by establishing a substantial gravity component.

The vinyl chloride gravity component is therefore tied to the amount of vinyl chloride released in a given incident, which is used as a measure of the seriousness of each violation. Also, for relief valve discharges, manual vent valve discharges, and 10 ppm violations, an adjustment factor is to be used to account for excessive frequency of discharges in a given time, which is a reflection of poor performance regardless of the amount of vinyl chloride discharged to the atmosphere. The frequency adjustment factor differs from the adjustment factor for history of noncompliance, which reflects violations occurring prior to those which are the subject of the current enforcement action.

The chart is to be applied as follows: For each violation, assign a dollar amount based on the type and magnitude of violation as described in the chart. Relief valve discharges, manual vent valve discharges and violations of 10 ppm standards

should then be grouped by calendar years. If the number of these violations is three or more in any calendar year, the total penalty for that period should be multiplied by the appropriate "frequency adjustment factor." The total gravity component for the case is the sum of the penalty numbers for each violation, adjusted where appropriate to account for excessive frequency. The settlement penalty for the case as a whole cannot exceed the statutory maximum of \$25,000 per day per violation. Sample calculations are attached to this policy.

The economic benefit component may be impractical to determine in vinyl chloride cases, depending on the nature of the violations. The benefit component should be determined if feasible, e.g., where a pattern of violations indicates a need for specific technology, equipment, or procedures, or where the defendant has chosen a "fix" to address a series of violations.

This revised policy shall apply to all pending and future vinyl chloride cases.

Relief Valve Discharges, Manual Vent Valve Discharges, Violations
of 10 ppm Standards

Emissions

Pounds of VC released
Penalty

0 - 100
>100 - 2000
>2000 - 5000
>5000 - 7500
>7500 - 10,000
over 10,000
\$1000
2000
5000
10,000
15,000
25,000

Frequency Adjustment Factors
of Violations in Calendar Year
Multiplier

3
4+
1.5
2

Failure to Report

Size of Release Not Reported (lbs.)
Penalty

0 -100
100- 500

500 - 1000
1000 - 2000
over 2000
\$2000
6000
10,000
20,000
25,000

Graduated scale for late reporting (if not in response to direct request from State or EPA) - 10-day discharge reports (as percentage of penalty for failure to report)

Within 2 months (from discharge)	25% of penalty
2-4 months	50% " "
4-6 months	75% " "
over 6 months	100% " "

Stripping Violations and Reactor Opening Loss Violations Stripping

Magnitude of Violation

Suspension/Latex
Dispersion
Penalty

400-500ppm

500-600

600-700

700-800

800-900

900-1200

1200-1400

1400-1600

over 1600

2000-2500 ppm

2500-3000

3000-3500

3500-4000

4000-4500

4500-6000

6000-7000

7000-8000

over 8000

\$1000

2000

3000

4000

5000

10000

15000

20000

25000

Reactor Opening Loss

Penalty = \$1000/violation (for each reactor)

Failure to Measure

Penalty = Maximum penalty amount for each type of violation
= \$25000 (stripping)
= \$1000 (reactor opening loss)

Failure to Submit Complete Semiannual Report

Penalty = \$25,000

Graduated scale for late semiannual report (if not in response to direct request from state to EPA)

Within 2 months	\$6,250
2-4 months	12,500
4-6 months	18,750
Over 6 months	25,000

Example 1

ABC Chemical Corporation owns a polyvinyl chloride plant in Louisiana. The United States has filed an enforcement action alleging relief valve discharge violations, failure to report relief valve discharges, reactor opening violations, and stripping violations. The settlement penalty is determined as follows:

Gravity Component

Relief Valve Discharges		Penalty/Discharge	
July 6, 1981	446 lbs.	\$2,000	
August 15, 1981	1250 lbs	\$2,000	x 1.5 = \$7,500
November 30, 1981	46 lbs	\$1,000	
March 17, 1982	127 lbs	\$2,000	x 1 = \$12,000
July 15, 1982	6271 lbs	\$10,000	
Subtotal for Relief Valve Discharges		\$19,500	
Failure to Report			
Failed to report July 6, 1981 discharge		\$5,000	
Report August 15, 1981 discharge 1			
Month late - 25% x \$20,000		5,000	
Subtotal for reporting		\$10,000	
Reactor Opening Loss Violations			
77 reactor opening loss violations		\$77,000	
Stripping Violations (Suspension)			
January 17, 1982	556 ppm	\$2,000	
July 10, 1982	421 ppm	\$1,000	
August 19, 1982	494 ppm	\$1,000	
Subtotal for stripping		\$4,000	
Total Gravity Component		\$110,500	

Benefit Component

None determined

Preliminary deterrence amount	\$110,500
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Adjustments

Negligence

Add 30% of gravity component - emission
violations generally due to
repetition of same cause

+ 30% (110,500)	+ \$ 33,150
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Minimum penalty settlement amount	\$143,650
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Example 2

Polynesian Polymers, Inc., owns a polyvinyl chloride plant in Texas. The United States has filed an enforcement action alleging relief valve and manual vent valve discharge violations, reporting violations, and reactor opening loss violations. The settlement penalty is determined as follows:

Gravity Component

Relief Valve and Manual Vent Valve Discharges

Penalty/Discharge

July 6, 1983	271 lbs	\$2,000	
July 15, 1983	621 lbs	2,000	
August 21, 1983	710 lbs.	2,000	
November 1, 1983	6,221 lbs.	10,000	x 2 + 32,000
January 17, 1984	7,721 lbs	15,000	
			X 1 + 17,000
November 30, 1984	526 lbs	2,000	
January 14, 1985	2,771 lbs	5,000	
July 19, 1985	4 lbs	1,000	x 1.5 + 12,000
December 21, 1985	172 lbs	2,000	

Subtotal for Relief Valve Discharges \$61,000

Failure to Report

Failed to report Nov. 1, 1984 discharge \$25,000

Failed to report Nov. 30, 1984 discharge 10,000

Subtotal for reporting \$35,000

Reactor Opening Loss Violations

214 reactor opening loss violations	\$214,000
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Total Gravity Component	\$310,000
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Benefit Component

Economic benefit of delay in installing "clean reactor" technology-deemed necessary to comply with reactor opening loss standard (BEN calculations)	\$100,000
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Preliminary deterrence amount	\$410,000
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Adjustments

History of Noncompliance

Add 30% of subtotal for reporting violations; cited for similar violations at his plant in action under the Clean Water Act	+ 10,500
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No other adjustments

Minimum penalty settlement amount	\$420,500
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APPENDIX III

ASBESTOS DEMOLITION AND RENOVATION CIVIL PENALTY POLICY Revised: May 5, 1992

The Clean Air Act Stationary Source Civil Penalty Policy ("General Penalty Policy") provides guidance for determining the amount of civil penalties EPA will seek in pre-trial settlement of civil judicial actions under Section 113 (b) of the Clean Air Act ("the Act"). In addition, the General Penalty Policy is used by the Agency in determining an appropriate penalty in administrative penalty actions brought under Section 113 (d)(1) of the Act. Due to certain unique aspects of asbestos demolition and renovation cases, this Appendix provides separate guidance for determining the gravity and economic benefit components of the penalty. Adjustment factors should be treated in accordance with the General Penalty Policy.

This appendix is to be used for settlement purposes in civil judicial cases involving asbestos NESHAP demolition and renovation violations, but the Agency retains the discretion to seek the full statutory maximum penalty in all civil judicial cases which do not settle. In addition, for administrative penalty cases, the Appendix is to be used in conjunction with the General Penalty Policy to determine an appropriate penalty to be pled in the administrative complaint, as well as serving as guidance for settlement amounts in such cases. If the Region is referring a civil action under Section 113(b) against a demolition or renovation source, it should recommend a minimum civil penalty settlement amount in the referral. For administrative penalty cases under Section 113 (d)(1), the Region will plead the calculated penalty in its complaint. In both instances, consistent with the General Penalty Policy, the Region should determine a "preliminary deterrence amount" by assessing an economic benefit component and a gravity component. This amount may then be adjusted upward or downward by consideration of other factors, such as degree of willfulness and/or negligence, history of noncompliance ability to pay, and litigation risk.

The "gravity" component should account for statutory criteria such as the environmental harm resulting from the violation, the importance of the requirement to the regulatory

¹ As discussed in the General Penalty Policy, history of noncompliance takes into account prior violations of all environmental statutes. In addition, the litigation team should consider the extent to which the gravity component has already been increased for prior violations by application of this

Appendix.

scheme, the duration of the violation, and the size of the violator. Since asbestos is a hazardous air pollutant, the penalty policy generates an appropriately high gravity factor associated with substantive violations (i.e. failure to adhere to work practices or to prevent visible emissions from waste disposal). Also, since notification is essential to Agency enforcement, a notification violation may also warrant a high gravity component, except for minor violations as set forth in the chart for notification violations on page 15.

I. GRAVITY COMPONENT

The chart on pages 15-16 sets forth penalty amounts to be assessed for notification and waste shipment violations as part of the gravity component of the penalty settlement figure. The chart on page 17 sets forth a matrix for calculating penalties for work-practice, emission and other violations of the asbestos NESHAP.

A. Notice Violations

1. No Notice

The figures in the first line of the Notification and waste Shipment Violations chart (pp. 15-16) apply as a general rule to failure to notify, including those situations in which substantive violations occurred and those instances in which EPA has been unable to determine if substantive violations occurred.

If EPA does not know whether substantive violations occurred, additional information, such as confirmation of the amount of asbestos in the facility obtained from owners, operators, or unsuccessful bidders, may be obtained by using section 114 requests for information or administrative subpoenas. If there has been a recent purchase of the facility, there may have been a pre-sale audit of environmental liabilities that might prove useful. Failure to respond to such a request should be assessed an additional penalty in accordance with the General Penalty Policy. The reduced amounts in the second line of the chart apply only if the Agency can conclude, from its own inspection, a State inspection, or other reliable information, that the source probably achieved compliance with all substantive requirements.

2. Late, Incomplete or Inaccurate Notice

Where notification is late, incomplete or inaccurate, the

Region should use the figures in the chart, but has discretion to insert appropriate figures in circumstances not addressed in the matrix. The important factor is the impact the company's action has on the Agency's ability to monitor substantive compliance.

B. Work-Practice, Emission and Other Violations

Penalties for work-practice, emissions and other violations are based on the-particular regulatory requirements violated The figures on the chart (page 17) are for each day of documented violations, and each additional day of violation in the case of continuing violations. The total figure is the sum of the penalty assigned to a violation of each requirement. Apply the matrix for each distinct violation of sub-paragraphs of the regulation that would constitute a separate claim for relief if applicable (e.g., § 61.145(c)(6)(i), (ii), and (iii)).

The gravity component also depends on the amount of asbestos involved in the operation, which relates to the potential for environmental harm associated with improper removal and disposal. There are three categories based on the amount of asbestos, expressed in "units," a unit being the threshold for applicability of the substantive requirements.² If a job involves friable asbestos on pipes and other facility components, the amounts of linear feet and square feet should each be separately converted to units, and the numbers of units should be added together to arrive at a total. Where the only information on the amount of asbestos involved in a particular demolition or renovation is in cubic dimensions (volume), 35 cubic feet is the applicability limit which is specified in § 61.145(a)(1)(ii).

Where the facility has been reduced to rubble prior to the inspection, information on the amount of asbestos can be sought from the notice, the contract for removal or demolition, unsuccessful bidders, depositions of the owners and operators or maintenance personnel, or from blueprints if available. The Region may also make use of § 114 requests and § 307 subpoenas to gather information regarding the amount of asbestos at the facility. If the Region is unable to obtain specific information on the amount of asbestos involved at the site from the source, the Region should use the maximum unit range for which it has adequate evidence.

Where there is evidence indicating that only part of a demolition or renovation project involved improper stripping, removal, disposal or handling, the Region may calculate the number of units based upon the amount of asbestos reasonably related to such improper practice. For example, if improper

² This applicability threshold is prescribed in 61.145(a)(1) as the combined amount of regulated-asbestos containing material (RACM) on at least 80 linear meters (260 linear feet) of pipes,

or at least 15 square meters (160 square feet) on other facility components, or at least 1 cubic meter (35 cubic feet) off facility components.

removal is observed in one room of a facility, but it's apparent that the removal activities in the remainder of the facility are done in full compliance with the NESHAP, the Region may calculate the number of units for the room rather than the entire facility.

C. Gravity Component Adjustments

1. Second and Subsequent Violations

Gravity components are adjusted based on whether the violation is a first, second, or subsequent (i.e., third, fourth, fifth, etc.) offense.³ A "second" or "subsequent" violation should be determined to have occurred if, after being notified of a violation by the local agency, State or EPA at a prior demolition or renovation project, the owner or operator violates the Asbestos NESHAP regulations during another project, even if different provisions of the NESHAP are violated. This prior notification could range from simply an oral or written warning to the filing of a judicial enforcement action. Such prior notification of a violation is sufficient to trigger treatment of any future violations as second or subsequent violations; there is no need to have an admission or judicial determination of liability.

Violations should be treated as second or subsequent offenses only if the new violations occur at a different time and/or a different job-site. Escalation of the penalty to the second or subsequent category should not occur within the context of a single demolition or renovation project, unless the project is accomplished in distinct phases or is unusually long in duration. Escalation of the violation to the second or subsequent category is required, even if the first violation is deemed to be "minor".

A violation of a § 113(a) administrative order (AO) will generally be considered a "second violation" given the length of time usually taken before issuing an AO and should be assessed a separate penalty in accordance with the General Penalty Policy

If the case involves multiple potential defendants and any one of them is involved in a second or subsequent offense, the penalty should be derived based on the second or subsequent offense. In such instance, the Government should try to get the prior-offending party to pay the extra penalties attributable to this factor. (See discussion below on apportionment of the penalty).

³ Continuing violations are treated differently than second or subsequent violations. See, Duration of Violation, below.

2. Duration of the Violation

The Region should enhance the gravity component of the penalty according to the chart (p. 17) to reflect the duration of the violation. Where the Region has evidence of the duration of a violation or can invoke the benefit of the presumption of continuing violation pursuant to Section 113(e)(2) of the Act, the gravity component of the penalty should be increased by the number of additional days of violation multiplied by the corresponding number on the chart.

In order for the presumption of continuing noncompliance to apply, the Act requires that the owner or operator has been notified of the violation by EPA or a state pollution control agency and that a prima facie showing can be made that the conduct or events giving rise to the violation are likely to have continued or recurred past the date of notice. When these requirements have been met, the length of violation should include the date of notice and each day thereafter until the violator establishes the date upon which continuous compliance was achieved.

When there is evidence of an ongoing violation and facts do not indicate when compliance was achieved, presume the longest period of noncompliance for which there is any credible evidence and calculate the duration of the violation based on that date. This period should include any violations which occurred prior to the notification date if there is evidence to support such violations. However, if the violations are based upon the statutory presumption of continuing violation, only those dates after notification may be included. When the presumption of continuing noncompliance can be invoked and there is no evidence of compliance, the date of completion of the demolition or renovation should be used as the date of compliance. (U.S. v. Tzavah Urban Renewal Corp., 696 F. Supp. 1013 (D.N.J. 1988))⁴ Where there has been no compliance and the demolition or renovation activities are ongoing, the penalty should be calculated as of the date of the referral and revised upon a completion date or the date upon which correction of the violation occurs.

Successive violations exist at the same facility when there is evidence of violations on separate days, but no evidence (or presumption) that the violations were continuing during the intervening days. For example, where there has been more than one inspection and no evidence of a continuing violation, violations uncovered at each inspection should be calculated as separate successive violations. As discussed in Section C (I) above, successive violations occurring at a single demolition or renovation project will each be treated as first violations, unless they are initially treated as second or subsequent violations based upon a finding of prior violations at a

different job-site or because they warrant escalation based upon the fact that the current job is done in distinct phases or is, unusually long in duration. The chart on page 16 reflects that additional days of violation for which there is inspection evidence are assessed the full substantive penalty amount while additional days based upon the presumption of continuing violation are assessed only ten percent of the substantive penalty per day.

Since asbestos projects are usually short-lived, any correction of substantive violations must be prompt to be effective. Therefore, EPA expects that work practice violations brought to the attention of an owner or operator will be corrected promptly, thus ending the presumption of continuing violation. This correction should not be a mitigating factor, rather this policy recognizes that the failure to promptly correct the environmental harm and the attendant human health risk implicitly increases the gravity of the violation. In particularly egregious cases the Region should consider enhancing the penalty based on the factors set forth in the General Penalty Policy.

⁴ The court in Tzavah held that for purposes of asbestos NESHAP requirements, a demolition or renovation project has not been-completed until the NESHAP has been complied with and all

3. Size of the Violator

An increase in the gravity component based upon the size of the violator's business should be calculated in accordance with the General Penalty Policy. Where there are multiple defendants, the Region has discretion to base the size of the violator calculation on any one or all of the defendants' assets . The Region may choose to use the size of the more culpable defendant if such determination is warranted by the facts of the case or it may choose to calculate each defendant's size separately and apportion this part of the penalty (see discussion of apportionment below).

II. ECONOMIC BENEFIT COMPONENT

This component is a measure of the economic benefit accruing to the operator (usually a contractor), the facility owner, or both, as a result of noncompliance with the asbestos regulations. Information on actual economic benefit should be used if available. It is difficult to determine actual economic benefit, but a comparison of unsuccessful bids with the successful bid may provide an initial point of departure. A comparison of the operator's actual expenses with the contract price is another indicator. In the absence of reliable information regarding a defendant's actual expenses, the attached chart provides figures

which may be used as a "rule of thumb" to determine the costs of stripping, removing, disposing of and handling asbestos in compliance with § 61.145© and §61.150. The figures are based on rough cost estimates of asbestos removal nationwide. If any portion of the job is done in compliance, the economic benefit should be based only on the asbestos improperly handled. It should be assumed, unless there is convincing evidence to the contrary, that all stripping, removal, disposal and handling was done improperly if such improper practices are observed by the inspector.

III. APPORTIONMENT OF THE PENALTY

This policy is intended to yield a minimum settlement penalty figure for the case as a whole. In many cases, more than one contractor and/or the facility owner will be named as defendants. In such instances, the Government should generally take the position of seeking a sum for the case as a whole, which the multiple defendants can allocate among themselves as they wish. On the other hand, if one party is particularly deserving of punishment so as to deter future violations, separate settlements may ensure that the offending party pays the appropriate penalty.

It is not necessary in applying this penalty policy to allocate the economic benefit to each of the parties precisely. The total benefit accruing to the parties should be used for this component. Depending on the circumstances, the economic benefit may actually be split among the parties in any combination. For example, if the contractor charges the owner fair market value for compliance with asbestos removal requirements and fails to comply, the contractor has derived an economic benefit and the owner has not. If the contractor underbids because it does not factor in compliance with asbestos requirements, the facility owner has realized the full amount of the financial savings. (In such an instance, the contractor may have also received a benefit which is harder to quantify - obtaining the contract by virtue of the low bid.)

There are circumstances in which the Government may try to influence apportionment of the penalty. For example, if one party is a second offender, the Government may try to assure that such party pays the portion of the penalty attributable to the second offense. If one party is known to have realized all or most of the economic benefit, that party may be asked to pay for that amount. Other circumstances may arise in which one party appears more culpable than others. We realize, however, that it may be impractical to dictate allocation of the penalties in negotiating a settlement with multiple defendants. The Government should therefore adopt a single "bottom line" sum for the case and should not reject a settlement which meets the bottom line because of the way the amount is apportioned.

Apportionment of the penalty in a multi-defendant case may be

required if one party is willing to settle and others are not. In such circumstances, the Government should take the position that if certain portions of the penalty are attributable to such party (such as economic benefit or second offense), that party should pay those amounts and a reasonable portion of the amounts not directly assigned to any single party. However, the Government should also be flexible enough to mitigate the penalty for cooperativeness in accordance with the General Penalty Policy. If a case is settled as to one defendant, a penalty not less than the balance of the settlement figure for the case as a whole should be sought from the remaining defendants. This remainder can be adjusted upward, in accordance with the general Civil Penalty Policy, if the circumstances warrant it. Of course, the case can also be litigated against the remaining defendants for the maximum attainable penalty. In order to assure that the full penalty amount can be collected from separate settlements, it is recommended that the litigation team use ABEL calculations, tax returns, audited financial statements and other reliable financial documents for all defendants prior to making settlement offers.

IV. OTHER CONSIDERATIONS

The policy seeks substantial penalties for substantive violations and repeat violations. Penalties should generally be sought for all violations which fit these categories. If a company knowingly violates the regulations, particularly if the violations are severe or the company has a prior history of violations, the Region should consider initiating a criminal enforcement action.

The best way to prevent future violations of notice and work practice requirements is to ensure that management procedures and training programs are in place to maintain compliance. Such injunctive relief, in the nature of environmental auditing and compliance certification or internal asbestos control programs, are desirable provisions to include in consent decrees settling asbestos violations.

V. EXAMPLES

Following are two examples of application of this policy ⁵

Example 1 (This example illustrates calculations involving proof of continuing violations based on the inferences drawn from the evidence)

XYZ Associates hires America's Best Demolition Contractors to demolish a dilapidated abandoned building containing 1300 linear feet of pipe covered with friable asbestos, and 1600 square feet of siding and roofing sprayed with asbestos. Neither company notifies EPA or State officials prior to commencing demolition of

the building on November 1. Tipped off by a citizen complaint, EPA inspects the site on November 5 and finds that the contractor has not been wetting the suspected asbestos removed from the building, in violation of 40 C.F.R. § 61.145(c)(3). In addition, the contractor has piled dry asbestos waste material on a plastic sheet in the work area pending its disposal, in violation of 40 C.F.R. § 61.145(c)(6)-(I). There is no evidence of any visible emissions from this pile. During the inspection, the site supervisor professes complete ignorance of asbestos NESHAP requirements. An employee tells the inspector that workers were never told the material on-site contained asbestos and states "since this job began we've just been scraping the pipe coverings off with our hammers. The inspector observes there is no water at the site. The inspector takes samples and sends them to an EPA approved lab which later confirms that the material is asbestos. Work is stopped until the next day when a water tank truck is brought to the facility for use in wetting during removal and storage.

On November 12 the inspector returns to the site only to find that the workers are dry stripping the siding and roofing because the water supply had been exhausted and the tank truck removed. A worker reports that the water supply had lasted four days before it ran out at the close of the November 9 work day. The inspector observes a new pile of dry asbestos containing debris in tall grass at the back of the property. Unlike the pile observed inside the facility during the first inspection this pile is presumed to have produced visible emissions. At the time of the second inspection 70% of the asbestos had been removed from the building 50% of which is deemed to have been

⁵ The examples are intended to illustrate application the civil penalty policy. For purposes of this policy, any criminal conduct that may be implied in the examples has been ignored. Of course, in appropriate cases, prosecution for criminal violations should be pursued through appropriate channels.

improperly removed. After discussion with EPA officials, work is halted at the site and XYZ Associates hires another contractor to properly dispose of the asbestos wastes and to remove the remaining 25% of the asbestos in compliance with the asbestos NESHAP. The new contractor completes disposal of the illegal waste pile on November 18.

Neither XYZ Associates nor America's Best Demolition Contractors has ever been cited for asbestos violations by EPA or the State. Both companies have assets of approximately \$5,000,000.00 and have sufficient resources to pay a substantial penalty.

The defendants committed the following violations: one violation of the notice provision (§ 61.145(b)(1)); one violation for

failure to wet during stripping (§ 61.145(c)(3)) and failure , to keep wet until disposal (§ 61.145(c)(6)(I)), each detected at the first inspection and lasting a duration of five days (Nov. 15); a second separate dry stripping violation (§ 61.145(c)(3), observed at the second inspection and lasting for three days (Nov. 10-12); an improper disposal violation (§ 61.150(b)), discovered during the second inspection, lasting a duration of nine days (the violation began on November 10 and continues to November 18 per Tzavah) and a visible emissions violation (§61.150(a)) discovered during the second inspection, lasting a duration of seven days (Nov. 12-18). Thus, the defendants are liable for a statutory maximum of \$750,000 (29 days of work practice violations x \$25,000 (statutory maximum penalty per day of each separate substantive violation) ~ \$25,000 for the notice violation = \$750,000).

The penalty is computed as follows:

Gravity Component

Notice violation, § 61.145(b)	
(first time)	\$15,000

⁶ America's Best completed 75% of the work over a 12 day period. For 4 of the 12 days (Nov.6-9-) there is evidence that water was used and asbestos properly handled. Assume that equal amounts of asbestos were removed each day. Thus, 50% of the asbestos was properly removed (25% by America's Best, 25% by the new contractor.

⁷ Arguable, for purposes of calculating the statutory maximum, the notice violation can be construed to have~lasted at least until the EPA has actual notice of the demolition (or renovation, as the case may be).

--First Inspection Violations

Violation of § 61.145(c)(3)	
(10 + 5 = 15 units	
of asbestos (1 x \$10,000)	\$10,000

Additional days of violation	
(\$1,000 x 4 days of violations)	\$ 4,000

Violation of § 61.145(c)(6)(I)	
(1 x \$10,000)	\$10,000

Additional days of violation	
(\$1,000 x 4 days of violations)	\$ 4,000

-- Second Inspection Violations

New violation of § 61.145(c)(3) (1 x \$10,000)	\$10,000
Additional days of violation (\$1,000 x 2 days of violations)	\$ 2,000
Violation of §61.150(a) (1 x \$10,000)	\$10,000
Additional days of violation (\$1,000 x 6 days of violations)	\$ 6,000
Violation of § 61.150(b) (1 x \$10,000)	\$10,000
Additional days of violation (\$1,000 x 8 days of violations)	<u>\$ 8,000</u>
	\$109,000
--Size of Violator (size of both defendants combined)	\$20,000
Total Gravity Component	\$129,000
Economic Benefit component	
\$20/sq. foot x 1600 sq. feet +	\$32,000
\$20/linear foot x 1300 linear feet +	<u>26,000</u>
	\$58,000
\$58,000 x 50% (% of asbestos improperly handled)	\$29,000
<u>Preliminary Deterrence Amount</u>	
Adjustment factors - No adjustment for prompt correction of environmental problem because that is what the defendant is supposed to do.	<u>\$158, 000</u>
Minimum penalty settlement amount	<u>\$158, 000</u>

NOTE: If the statutory maximum had been smaller than this sum, then the minimum penalty would have to be adjusted accordingly. Also, for the dry stripping violations, no additional days were added for the period between the two inspections because there was no evidence that the dry stripping had continued in the interim period.

Example 2 (This example illustrates calculations involving proof of continuing violations based on the statutory inference drawn from the notice of violation

Consolidated Conglomerates, Inc. hires Bert and Ernie's Trucking Company to demolish a building which contains 1,000, linear feet of friable asbestos on pipes. Neither party gives notice to EPA or. to the state prior to commencement of demolition. An EPA inspector acting on a tip, visits the site on April, 1, the first day of the building demolition. During the inspection he observes workers removing pipe coverings dry. Further inquiry reveals there is no water available on-site. He, also finds a large unconstrained pile of what appears to be dry asbestos-captaining waste material at the bottom of an embankment behind the building. He takes samples and issues an oral notice of violation citing to 40 : C.F.R. §§ 61.145(c)(3) (dry removal), : 61.145(c)(6)(I) (failure to keep wet until disposal), and 61.145(a) (visible emissions) ⁸, and gives the job supervisor a copy of the asbestos NESHAP. Test results confirm the samples contain a substantial percentage of asbestos.

On April 12, the inspector receives information from

⁸ Regardless of whether the inspector observes emissions of asbestos during a site inspection', where there is circumstantial evidence (such as unconstrained, dry asbestos piles outside), that support a conclusion that visible emissions were present, the Region has discretion to include this violation.

reliable source that the pile of dry asbestos debris has not been properly disposed of and there is still no access to water at the facility. This information supports a new violation of §61.150(b) (improper disposal). The inspector revisits the site on April 22 and determines that the waste pile has been removed. A representative of Consolidated Conglomerates, Inc. gives the inspector documents showing that actual work at the demolition site concluded on April 17, but the contractor cannot document when the debris pile was removed. Thus, there are at least 61 days of violation (17 days of dry removal in violation of § 61.145(c)(3) 22 days of failure to keep wet until disposal in violation of §61.145(c)(6)(I), 11 days of visible emissions in violation of §61.150(a) and 11 days of improper disposal in violation of § 61.150(b))

times \$25,000 per day, plus \$25,000 for the notice violations, or a statutory maximum of \$1,550,000.

Consolidated Conglomerates is a corporation with assets of over \$100 million and annual sales in excess of \$10 million. Bert and Ernie's Trucking is a limited partnership of two brothers who own tow trucks and have less than \$25,000 worth of business each year. This contract was for \$50,000. Bert and Ernie's was once previously cited by the State Department of Environmental Quality for violations of asbestos regulations. As a result, all violations are deemed to be second violations.

The penalty is computed as follows:

Gravity Components	
No notice 2nd violation)	\$ 20,000
Violation of § 61.145© (3)	
(approx. 3.85 units)	
(second violation)	\$ 15,000
Additional days of violation	
(per presumption) (16 x \$1,500)	\$ 24,000
Violation of §61.145(c)(5)(I)	\$ 15,000
(second violation)	
Additional days of violation	
(Per presumption) (21 x \$1,500)	\$31,500

⁹See footnote 3.

Violation of 661.150(a)	
(Second violation)	
Additional days of violation	
(per presumption) (10 x \$1,500)	\$15,000
Violation of §61.150(b)	
(second violation)	\$15,000
Additional days of violation	
(per presumption) (10 x \$1.,500)	<u>\$ 15.000</u>
	<u>\$180.500</u>
Size of Violator	\$ 2,000

(based on Bert and Ernie's size only)

Total Gravity Component \$182.500

Economic Benefit Component

\$20/linear foot. x 1,000 linear feet S 20,000

Preliminary Deterrence Amount \$202.500

Adjustment factors – 10% increase for
willfulness \$ 18,250

Minimum Settlement Penally Amount \$220,750

NOTE: Since this example assumes there was a proper factual basis for invoking the statutory presumption of continuing noncompliance, the duration of the §61.150(a) visible emissions and §61.150(b) disposal violation runs to April 21 and the §61.145(c)(3) dry removal violation runs to April 17, the longest periods for which noncompliance can be presumed.

Apportionment of the Penalty

The calculation of the gravity component of the penalty in this case reflects a \$5,000 increase in the notice penalty and a \$48,500 increase in the penalty for substantive violations because it involves a second validation by the contractor. Ordinarily, the Government should try to get Bert and Ernie's to pay at least these additional penalty amounts. However, Consolidated Conglomerate's financial size. compared to the contractor's may dictate that Consolidated pay most of the penalty.

Notification and Waste Shipment Record Violations

<u>Notification Violations</u>	<u>1st Violation</u>	<u>2nd Violation</u>	<u>Subsequent</u>
No notice	\$15,000	\$20,000	\$25,000
No notice substantive compliance	\$ 5,000	\$15,000	\$25,000

Late, Incomplete or Inaccurate notice.

For each notice, select the single largest dollar figure that applies from the following table. These violations are

assessed a one-time penalty except for waste shipment vehicle marking which should be assessed a penalty per day of shipment. Add the dollar figures for each notice or waste shipment violation:

Notice submitted after asbestos removal completed tantamount to no notice.	\$15,000
--	----------

Notice lacks both job location and asbestos removal starting and completion dates.	\$ 4,000
--	----------

Notice submitted while asbestos removal is in progress.	\$ 2,000
---	----------

Notice lacks either job location or asbestos removal starting and completion dates.	\$ 2,000
---	----------

Failure to update notice when amount of asbestos changes by at least 20%	\$ 2,000
--	----------

Failure to provide telephone and written notice when start date changes	\$ 2,000
---	----------

Notice lacks either asbestos removal starting or completion dates, but not both.	\$ 1,000
--	----------

Amount of asbestos in notice is missing, improperly dimensioned, or for multiple facilities.	\$ 500
--	--------

Notice lacks any required information	\$ 200
---------------------------------------	--------

Notice submitted late, but still prior to asbestos removal starting date.	\$ 200
---	--------

Waste Shipment Violations

Failure to maintain records which precludes discovery of waste disposal activity	\$ 2,000
---	----------

Failure to maintain records but other information regarding waste disposal available	\$1.000
---	---------

Failure to mark waste transport vehicles during loading and unloading (assess for each day of shipment)	\$1,000
---	---------

<u>Total amount of asbestos involved in the operation</u>	<u>First violation</u>	<u>Bach add. day of violation</u>	<u>Second violation</u>	<u>Each add. day of Violation</u>	<u>Subsequen t violation</u>	<u>Each add. day of violation</u>
≤ 10 units	\$ 5,000	\$ 500	\$15,000	\$ 1,500	\$25,000	\$ 2,000
> 10 units but < 50 units	\$10,000	\$ 1,000	\$20,000	\$ 2,000	\$25,000	\$ 2,000
> 50 units	\$15,000	\$ 1,500	\$25,000	\$ 2,500	\$25,000	\$ 2,500

unit = 260 linear feet, 160 square feet or 35 cubic feet - if more than one is involved, convert each amount to units and add together

Apply matrix separately to each violation of §61.145(a) and each sub-paragraph of § 61.145© and §61.150, except §61.150 (d)(waste shipment records) which is treated as a one time violation and § 61.150 © (vehicle marking) (see chart on pages 15-16) calculate additional days of violation, when applicable, for each sub-paragraph - add together

Benefit Component

For asbestos on pipes or other facility components:

\$20 per linear, square or cubic foot of asbestos for any substantive violation.

APPENDIX IV

CLEAN AIR ACT PENALTY POLICY AS APPLIED TO STATIONARY SOURCES OF VOLATILE ORGANIC COMPOUNDS WHERE REFORMULATION TO LOW SOLVENT TECHNOLOGY IS THE APPLICABLE METHOD OF COMPLIANCE

Introduction

This addendum provides guidance for calculating the civil penalties EPA will require in pre-trial settlement of district court enforcement actions, pursuant to Title I of the Clean Air Act (CAA), against sources of volatile organic compounds- (VOC's) in violation of State Implementation Plan emission limitation, where low solvent technology (LST) is an acceptable control strategy for achieving compliance. If compliance using LST is the control strategy chosen by the source and if it can be im-

plemented expeditiously, the penalty analysis methodology set forth in this appendix must be used. If compliance using LST is not the compliance strategy chosen by the source, or if LST cannot be accomplished expeditiously or is not available, the penalty must be calculated according to the general Clean Air Act Stationary Source Civil Penalty Policy, (hereinafter CAA Penalty Policy), based on the costs of add-on controls.

A separate policy for arriving at a penalty figure in VOC cases where LST is an acceptable control strategy is necessary because penalties calculated pursuant to the general CAA Penalty Policy in such instances are insufficient to deter violations.~/
The general Penalty Policy focuses upon recapturing the economic savings of non-compliance-based upon the typically substantial capital expenditures and operation and maintenance costs of the necessary pollution control equipment. The capital costs of implementing LST are by comparison relatively small and in many cases LST actually results in a net economic savings.2/

This guidance, therefore, sets forth an objective methodology for arriving at a substantial cash penalty figure in cases not requiring the expenses associated with add-on technology. Specifically, in all VOC cases including those where a source may choose to come into compliance using LST as a control option, Regions must base their pre-negotiation penalty calculations for the Economic Benefit Component on the cost of add-on controls. Once negotiations begin, the Region may

recalculate the penalty figure using the alternative methodology in this Appendix where applicable based on information to be supplied by the source. The Economic Benefit Component will be re-calculated based on the cost of LST as a control option. An additional penalty component (hereinafter referred to as the Production Component) must thereafter be calculated by multiplying the dollar amount of sales on the non-complying lines as reported by the source, by the average return on sales for the industry, to be supplied by NEIC. The average return on sales is the norm for the industry for net profits after taxes divided by total sales. Industry specific average return on sales multipliers are available from the Information Services Office at NEIC in Denver, FTS 776-5124 (contact Charlene Swibas). NEIC will require the following information from the Region to calculate the average return on sales multiplier for an individual source: (1) type of VOC source, (2) total assets or number of employees, and (3) dollar amount of sales produced on the non-complying lines by year. In this regard, EPA should advise sources that it is to their benefit to supply EPA with detailed information such as a plant specific breakdown of assets rather than company wide reports, and line-by-line sales figures. This will help ensure that the penalty is limited to sales from production on their non-complying lines as opposed to their total sales. When verifiable line-by-line production information is not available the Regions must base their estimates on sources' total sales as reported in company books and annual reports. In addition, the Production Component figure may be adjusted to reflect the source's actual return on sales where this figure can be established from reliable information.

The total of the Production and Economic Benefit Components should be compared to the penalty that would have been imposed were the source coming into compliance using add-on controls. In no event should the total of the Economic Benefit and Production Components exceed the penalty amount based solely on the cost of add-on controls.

This policy may be used in all situations involving LST as an acceptable compliance option, including those where the source is granted an expeditious schedule to continue development of LST, but may ultimately have to comply using add-on controls. In those situations where the source will comply through a combination of LST and add-on controls, the penalty may be adjusted in accordance with this Appendix only to the extent the two compliance options and the source's financial data are

segregable on a line-by-line basis.

No other adjustments to the Economic Benefit and Production Components may be made other than as contemplated in the general CAA Penalty Policy. These adjustments are described in Section II.A.3. of the general Policy. In addition, in all cases the Gravity Component should be estimated in accordance with the general CAA Penalty Policy. This policy is based upon the principles established by the CAA Penalty Policy and general Agency policies.

The Production Component formula produces penalties which automatically account for the size of the source and correlate with the emissions volume from non-complying lines. Moreover, attaching a source's after tax net profits on noncomplying production helps to ensure a meaningful penalty without impinging on employee salaries~ necessary operating costs, or tax deductions for good faith pollution control expenditures such as on LST.

Removing the profitability of non-complying production is particularly appropriate in cases where LST is an acceptable control strategy due to the ease with which many such sources could have come into compliance, as well as the competitive advantage some VOC sources obtain from non-compliance. For example, many paper coating concerns have continued to use high solvent coatings due to the versatility such solutions afford in meeting customer preferences such as color brightness. Such VOC sources are, thus., probably able to capture a larger share of the market due to their noncompliance. Similarly, metal furniture coaters have had high solid emulsion-LSTs available for many years. Many sources have, however, delayed the minimal coats and process changes necessary to come into compliance, perhaps enabling these businesses, in the short run, to offer their products at a slightly reduced price.^{3/}

What follows is the specific methodology to be applied in calculating civil penalty settlement amounts in actions against sources of VOC where LST is an acceptable control strategy.

Alternative Methodology for Calculating VOC Penalties Where LST
is the Applicable Method of Compliance

ECONOMIC BENEFIT COMPONENT*

+

PRODUCTION COMPONENT

total sales from production on non-complying lines
x industry norm return on sales

Compare this figure to the penalty based on the cost of add-on
controls as the control option. Use the lower of the two figures.

+

Settlement Adjustments to Production component** substitute the
source's actual return on sales for the average industry return
on sales

+

GRAVITY COMPONENT*

+

Settlement Adjustments to Gravity Component*

ADJUSTED MINIMUM PENALTY FIGURE

* See, Clean Air Act Civil Penalty Policy for the procedures to follow in making these calculations. Note, however, that the CAA Penalty Policy permits Regions in their discretion not to seek to recover the Benefit Component when it is likely to be less than 65,000. This Appendix contemplates including the Economic Benefit Component along with the Production Component even where the Economic Benefit is estimated to be Less than \$5,000. If the combination of both the Economic Benefit and. Production Components is estimated to be Jess than \$5,000 it is not necessary for the case development team to include either one in the minimum settlement penalty amount.

** Note that the considerations described in Section II.A-3 of

the general policy may also be applied in adjusting the
Production Component as well as the Economic Benefit Component.

FOOTNOTES

1. Penalties must be high enough to have the desired specific and general deterrent effects. They must also be, to the extent possible, objective in order to ensure fairness. The general CAA Penalty Policy, relying on the cost of pollution control equipment, does not provide such penalties in the case of VOC sources using LST. Indeed VOC penalties have been much smaller than the penalties collected in other CAA cases. A sample of VOC sources, with total sales in the \$10,000,000 range, have had civil penalties ranging from \$2,000 to \$45,000. By comparison, a company cited for TSP violations, with sales in 1983 of \$4,656,000, will be asked to pay a minimum of \$75,000 in penalties.

2. Although substantial capital expenditures are required for VOC sources using add-on technology to come into compliance, sources having the option of using low solvent or water-based technology derive economic savings by coming into compliance. For example, reformulation to LST generally involves only minor mechanical and process modifications costing less than \$10,000. (See note 4 *infra*.) These small outlays are recaptured by subsequent cost savings. For example, water-based coatings are usually less expensive. Similarly, high solid emulsion-LSTs, although perhaps more expensive on a volume basis, are more efficient when properly applied, requiring fewer coatings. Reduced VOC emissions result in further indirect savings in the form of lower employee health problems and absenteeism, reduction in the cost and amount of OSHA-required ventilation, and lower fire insurance rates. Finally, the vast majority of VOC sources having LST as a readily available option for compliance make only small investments in R&D, expenditures which are, moreover, fully tax deductible.

3. Use of high solid emulsion-LST requires installation of a \$5-7,000 emulsion heater, retraining of employees to apply the thicker emulsion, and installation of a larger or more efficient metal washing system to prevent pitting. As is noted above, however, these costs are in the long run recaptured by the economic savings associated with high solid emulsion-LST. (See note 2 *supra*.)

Air Civil Penalty Worksheet

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

APPENDIX V Air Civil Penalty Worksheet

A. Benefit Component: _____
(enter from computer calculation)

B. Gravity Component:

1. Actual or possible harm

a.. amount above standard: _____

b.. Toxicity of pollutant: _____

c. Sensitivity of environment _____

d. Length of time of violation _____

2. Importance to regulatory scheme _____

3. Size of violator: _____

Total gravity component: _____

Preliminary deterrence amount: _____
(sum of benefit and gravity components)

C. Flexibility Adjustment Factors:

1. Degree of willfulness or negligence:

total gravity component x any
augmentation percentage _____

2. Degree of cooperation:

total gravity component x any mitigation
percentage _____

3. History of noncompliance:

total gravity component x any
augmentation percentage _____

4. Ability to pay:
any mitigation amount _____

5. Other unique factors:

total gravity component x any mitigation
or augmentation percentage _____

All augmentation (+) and mitigation (-) _____
amounts added: (if negative, cannot
exceed total gravity component)

D. Initial Minimum Settlement Amount:
Preliminary Deterrence Amount + or -
Sum of Flexibility Adjustment Factors: _____

APPENDIX VI

Volatile Hazardous Air Pollutant Civil Penalty Policy

This policy shall be used to determine the gravity component of the civil penalty settlement amount for cases enforcing the National Emission Standard for Equipment Leaks (Fugitive Emission sources), 40 C.F.R. Part 61, Subpart Y, which applies to volatile hazardous air pollutants (VHAP) and the general reporting requirements of Subpart A. It is to be used in Lieu of the scheme for determining the gravity component set forth in the general Clean Air Act Stationary Source Civil Penalty Policy. It is intended as a supplement to the Vinyl Chloride Civil Penalty Policy for vinyl chloride cases. In those vinyl chloride cases in which the vinyl chloride and VHAP civil penalty policies are inconsistent (such as the \$25,000 penalty [or failure to timely submit a complete semi-annual report under the vinyl chloride policy versus the \$15,000 penalty for the same violation under the VHAP policy) the vinyl chloride penalty policy should be applied.

The preliminary deterrence amount for VHAP cases, as for other stationary source cases, consists of a gravity component and a benefit component. Adjustments for degree of willfulness or negligence, degree of cooperation, history of noncompliance, ability to pay, litigation practicalities, and other unique factors, should be made, if appropriate, in accordance with the Stationary source Civil Penalty Policy. Additionally, adjustments may be considered because a company's VHAP/VOC emissions or potential emissions are more serious in a nonattainment area for ozone. Reporting penalties could be adjusted depending on the number of VHAP sources, that is, whether a plant has few or numerous valves and pumps.

The gravity component of the penalty reflects the seriousness of the violation. A separate scheme has been developed for VHAP cases partly because the economic benefit component may be difficult to determine, although if the economic benefit can be calculated, it should be. In addition, several factors in the general policy, such as the level of violation as a percentage above the standard, do not directly apply to VHAP cases. The hazardous nature of VHAPs is reflected in establishing a substantial gravity component.

The attached chart addresses six major types of requirements in the VHAP standard:

1)Reporting. A source is required to submit initial and semiannual reports which include, among other things, a listing of equipment in VE&P service, records of leaks from certain pieces of equipment and repairs of leaks, and results of performance tests.

2)Monitoring, inspection, and testing. The standard includes our types of such requirements: annual testing, such as testing from certain requirements, under §61.242-2(e)(3); monthly monitoring, such as monitoring of valves under §61.242-7(a); weekly inspection, such as visual inspection of a pump under §61.242-2(a)(2); and daily checking, such as checking a sensor on a compressor seal system under §61.242-3(e)(1).

3)Repair of leaks. The standard generally requires that a source, upon detection of a leak from regulated equipment, make a first attempt at repair within 5 calendar day. of detection and complete the repair as soon as practicable but not later than 15 calendar days after detection. since violations of these requirements appear to present the greatest potential for emission. of VHAPs, the associated penalties are substantial.

4)Equipment standards. Certain piece of equipment must comply with requirements that specify that they be equipped with certain devices, sometimes as an alternative to another standard. For example, a compressor must be equipped with a seal system that includes a barrier fluid system and that prevents leakage of process fluid to the atmosphere, with certain exceptions, in accordance with §61.242-3(a). One allowable alternative~is that the compressor be equipped with a closed-vent system capable of capturing and transporting any leakage to a control device, in accordance with §61.242-3(h). Another example is open-ended valves which-must be capped or otherwise secured.

5)Recordkeeping. A source must keep records of a number of items, including leaks and attempts to repair leaks, design parameters of certain equipment, and dates of startups and shutdowns of closed-vent systems and control devices.

6)Marking equipment - Equipment in VHAP service must be tagged and leaking equipment must be separately or additionally

tagged.

The chart assign a gravity component for each violation. For equipment standards, noncompliance with respect to each piece of affected equipment (e.q., pump, compressor, etc.) constitutes a separate violation for purposes of this policy. For monitoring, inspection, and testing provisions, noncompliance with respect to each requirement (e.q., monthly monitoring of pumps, monthly monitoring of valve) constitutes a separate violation. Do not count each pump or valve as a separate violation if not monitored. The gravity component for the case as a whole is the sum of the numbers associated with all the violations in the case.

Type of Violation	Penalty
-------------------	---------

REPORTING

Initial Report

Failure to submit initial report for new or existing source	\$25,000
Late submission of initial report	\$500/day up to \$25,000
On-time but incomplete initial report. Estimate percentage of information missing. If missing information submitted without prompting \$400/day, up to the figure calculated above	\$25,000 x % of information missing

Semi-annual Reports

Failure to submit semiannual report	\$15,000 per report
Late submission of semiannual report [If submitted only in response to prompting by EPA or delegated agency, regard as failure to submit report]	\$150/day up to 15,000 per report

On-time but incomplete semiannual report $-\$15,000 \times \% \text{ of information missing}$. If missing information submitted without prompting by the government $\$125/\text{day}$ up to the figure calculated above.

Type of Violation	Penalty
-------------------	---------

Non-response

Failure to respond to prompting (written requests) regarding reports	\$25,000
---	----------

MONITORING, INSPECTION, AND TESTING

Annual requirement to \$25,000 total	\$10,000 + \$250/day up
---	-------------------------

Monthly requirement to \$7500 total for missed month)	\$5,000 + \$250/day (up
---	-------------------------

Daily requirement missed for first 10 daily inspection missed.	\$100/day for each day
---	------------------------

For any monitoring,
inspection or testing
timely performed, but
performed incorrectly,
assess 50% of the
above penalties

REPAIR OF LEAKS

Failure to make first attempt at repair within specified time	\$5000/day up to \$25,000 per leak
--	---------------------------------------

Failure to complete repair within specified time	\$5000/day up to \$25,000 per leak
---	---------------------------------------

Violations of alternative standards for valves in VHAP service pursuant to 40 CFR §61,243	\$5000/day up to \$25,000
---	---------------------------

Type of Violation	Penalty
-------------------	---------

EQUIPMENT STANDARDS

Failure to equip with required device	\$15,000 per item inadequately equipped
---------------------------------------	---

RECORDKEEPING

Failure to keep records in logs pursuant to 40 C.F.R. 61.246 for period associated with semiannual report	\$25,000 per semiannual period
---	--------------------------------

Incomplete records - estimate percentage of information missing	\$25,000 per semiannual period x % of information missing
---	---

FAILURE TO MARK (TAG) EQUIPMENT

Mark equipment in VHAP service equipment up to \$5,000	\$100/day per piece of
--	------------------------

Mark leaking equipment equipment up to \$5,000	\$500/day per piece of
--	------------------------

CLEAN AIR ACT STATIONARY SOURCE PENALTY POLICY APPENDIX VII

RESIDENTIAL WOOD HEATERS 40 C.F.R. PART 60, SUBPART AAA

The Clean Air Act Stationary, Source Civil Penalty Policy ("the CAA penalty policy" or "the general penalty policy") provides the basis for determining the minimum civil penalty U.S. EPA will accept in settlement of enforcement actions taken pursuant to Title of the Clean Air Act. The CAA penalty policy provides guidance to pre-trial settlement of initial enforcement actions in district courts.

The New Source Performance Standard for Residential Wood Heaters, 40 C.F.R. Part 60, Subpart AAA, warrants a penalty scheme related to the CAA penalty policy, but adjusted to reflect certain unique features of the wood heater industry. Unlike other NSPS programs, for example, the wood heater standard regulates a mass-produced consumer product marketed nationally and is directed at manufacturers as well as retailers and distributors. In addition, management of the wood stove enforcement program will be centralized at Headquarters rather than delegated to the Regions.

This appendix should be used in conjunction with the general penalty policy to determine the preliminary deterrence amount, which is the sum of the economic benefit accruing from noncompliance and the gravity component reflecting the seriousness of the violation.³ This appendix retains in full the concept of adjusting the gravity component to provide equitable treatment of the regulated community. The penalty adjustments may be based upon consideration of the violator's: (1) degree of willfulness or negligence, (2) degree of cooperation, including prompt reporting of noncompliance and prompt correction of environmental problems, (3) history of noncompliance, (4) ability to pay, and (5) other unique factors.

The wood stove penalty policy details most of the violations articulated in the regulations and assesses a basic penalty for each. Of the factors set forth in the general penalty policy only the size of the violator matrix and the adjustment factors are retained completely. The matrix for length of time of

violation has been revised. All other factors are inapplicable to the wood stove penalty policy.

Every gravity component calculation will be based on a case-by-case examination of the facts underlying the enforcement ~ -' n developing the penalty values for these violations, we evaluated the relative importance of each respective requirement to the regulatory scheme. In certain instances, U.S. EPA may find that a deviation from a requirement is tantamount to a complete violation and hold the violator liable for the full amount of the assessed penalty. In other instances, however, U.S. EPA may believe that the deviation is minor and therefore assess a reduced penalty. As an example, consider the §60.538(b) violation, offering for sale a stove without a permanent label. If the stove has no label at all, the full penalty will be believed. If, on the other hand, the permanent label is merely deficient, not conforming to the requirements under §60.536(a)(1)(2), then the penalty amount assessed will likely be less than the full amount. The following violations fall into this none/deficient" category:

- 60.533(0)(2)
- 60.533(0)(3)
- 60.536(a)(1),(2)
- 60.537(a)(1),(2)
- 60.537(a)(1),(3)
- 60.537(a)(1),(4)
- 60.537(a)(1),(5)
- 60.537
- 60.537(e)(1),(4)
- 60.537(e)(2)
- 60.537(e)(3)
- 60.537(f)
- 60.537(g)
- 60.537(h)
- 60.537(I)
- 60.538(a)
- 60.538(b)
- 60.538(d)(1),(2)
- 60.538(d)(1)(ii)

parameter quality assurance program
emission test QA program
permanent label
maintain record of certification test
maintain record of parameter QA program
Maintain record of emission test QA program
maintain record of sales
maintain/produce sealed stove
apply for small manufacturer exemption
report number of exempted stove manufactured
maintain record of production
report biennially on certified model lines
maintain record of exempted stoves
maintain record of used stoves
maintain records for five years
operation of stove without permanent label
offer for sale a stove w/o permanent label
offer for sale a stove w/o temporary label
offer for sale a stove w/o owner's manual

For the other violations contained in pages 3 to 6 of this
penalty policy, U.S. EPA intends to assess the full amount.

CALCULATION OF GRAVITY COMPONENT

SIZE OF THE VIOLATOR (calculate once per violator)

Net worth of corporation or
net current assets of partnership:

Under \$100,000	\$1,000
\$100,001 - \$1,000,000	2,000
\$1,000,001 - \$5,000,000	8,000
\$5,000,001 - \$20,000,000	12,000
\$20,000,001 - \$40,000,000	20,000
\$41,000,000 - \$70,000,000	40,000
Over \$70,000,000	65,000

LENGTH OF THE VIOLATION (calculate for each violation)

0 to 6 months	\$500
7 to 12 months	1,000
13 to 18 months	1,500
over 19 months	2,000

VIOLATIONS OF 40 C.F.R. PART 60, SUBPART AAA

60.530(c)(2)

Sale of Oregon exempted stove after July 1,
1992

\$5,000 per model
line and \$500
per unit

60.530(c)(3)

Failure to notify of any modification to
Oregon certification
\$500 per unit

60.533(n)

Failure to perform certification testing
\$5,000 per model

line and \$500
per unit

60.533(o)(2)
Failure to conduct adequate parameter QA
inspection
\$500 per unit
not tested as
required

60.533(o)(3)
Failure to conduct emission test QA program
\$500 per unit
not tested as
required

60.536(a)(1), (2)
Failure to have permanent label on stove
manufactured after July 1, 1988 (related to
60.538(b), but we can bring both in an
enforcement action)
\$2,000 per model
line and \$2 per
unit

60.536(I), (j)

Failure to have temporary label on a stove
with a permanent label

\$1,000 per model

line and \$2 per
unit

60.536(k)

(please see 60.538(d)(l(ii)))

60.537(a)(1), (2)

Failure to maintain record of certification
test

\$100 per model

line

60.537(a)(1), (3)

Failure to maintain record of parameter QA
program

\$1,000 per model

line

60.537(a)(1), (4)

Failure to maintain record of emission test
QA program

\$1,000 per model

line

60.537(a)(1), (5)

Failure to maintain record of sales

\$1,000

60.537

Failure to maintain or produce sealed stove

\$750 per sealed

stove required

60.537(e)(1), (4)

Failure to apply for small manufacturer's exemption
\$250

60.537(e)(2)

Failure to report number of exempted heaters manufactured between 7/1/88 and 6/30/89
\$500

60.537(e)(3)

Failure to maintain wood heater production records for 7/1/87 to 7/1/89
\$1,000

60.537(f)

Failure to report biennially on certified model line
\$100 per model line

60.537(g)

Failure to maintain record of F&D exempted stoves
\$500

60.537(h)

Failure to maintain record of used stoves
\$500

60.537(I)

Failure to maintain records for five years
\$500

60.538(a)

Operation of affected facility without a permanent label

\$500 per unit

60.538(b)

Offer for sale a stove without certification
test or permanent label
\$2,000 per model
line and \$2 per
unit

60.538

Offer for domestic sale of export stove
\$1,000 per unit

Sale of stove without a permanent label
after July 1, 1990
\$1,000 per unit

60.538(d)(1)(I), (2)

Offer for sale a stove with a permanent
label but not temporary label
\$1,000 per model
line and \$2 per
unit

60.538(d)(1)(ii)

Offer for sale a stove with a permanent
label but no owner's manual (encompasses
60.536(k))
\$500 per unit

60.538(d)(1)(iii)

Offer for sale a stove with a permanent
label but without a catalyst warranty
\$1,000 per model
line and \$2 per
unit

60.538(e)

Sale of stove after notice of certification
revocation

\$5,000 per unit

60.538(f)

Installation or operation of stove
inconsistent with label or owner's manual
\$2,000 per unit

60.538(g)

Operation of stove with deactivated or
removed catalyst
\$2,000 per unit

60.538(h)

Operation of altered stove
\$5,00 per unit

60.538(I)

Alteration or removal of permanent label
\$1,00 per unit

EXAMPLE

An inspector files a violation report against Blockbuster Manufacturing, which produces the Blue Flame and Heat Jet model lines. The report, dated November 8, 1988, states that the temporary label on the Blue Flame model line is deficient and that the company failed to conduct certification testing on the Heat Jet model line. In addition, the Heat Jet model line lacks permanent and temporary labels as well as owner's manuals. Blue Flame production since July 1, 1988 totaled 464 units with sales of 223 units, while Heat Jet production since July 1, 1988 totaled 108 units with sales of 36 units. Blockbuster's net worth is estimated at \$800,000.

The initial assessment of Blockbuster's violations indicates the following violations by model line:

Blue Flame

- attaching deficient temporary label
- selling unit with deficient temporary label

Heat Jet

- failure to conduct certification testing
- failure to attach permanent label
- selling unit without permanent label

(NOTE: the temporary label and owner's manuals violations are inapplicable for the Heat Jet model line because the units were not permanently labeled)

U.S. EPA issues a Finding of Violation to Blockbuster which includes both the Blue Flame and Heat Jet violations. In addition, an Administrative Order is issued to correct these violations. Blockbuster does correct all the Blue Flame violations by the stated deadline, but does not take any action toward correcting the Heat Jet violations. When contacted by EPA personnel after the deadline, Blockbuster says it feels no obligation to correct the Heat Jet violations. At this point, EPA decides to bring a civil action against Blockbuster concerning the Heat Jet model line only.

The preliminary deterrence amount is calculated by adding the economic benefit and gravity components. The economic benefit component is subdivided into two categories: capital investments, or one-time costs, and annual expenses. For this example, current

capital investments are \$9,000 for a full test series and \$4,000 for model line labels and manuals. Current annual expenses include \$3,067 for emissions and parameter inspection quality assurance and SI, 400 for research and development EPA personnel run the BENT model assuming compliance in April 1989 and the payment of penalty in March 1989. The BEHL model shows an economic-benefit of \$3,252. A copy of the BENT printout is attached for reference. The gravity component of \$66,788 is calculated as shown below:

Violation
Basic
Rate
Per
Unit
Length
of Time
Size of
Violator

No certification test
60,533(n)
\$5,000
\$500(108
)
\$500
\$2,000

Not attaching
permanent label
60.536(a)(1), (2)
2,000
2(108)
500

Selling unit without
permanent label
60.538(b)
2,000
2(36)

In light of Blockbuster's lack of cooperation in correcting the Heat Jet violations, EPA decides to increase the gravity component by 25%. The gravity component becomes $\$66,788(1.25) = \$83,485$. The bottom line amount for the purposes of settlement is $\$3,252$ (the economic benefit) + $\$83,485$ (the adjusted gravity component) = $\$86,737$.

APPENDIX VIII

CLEAN AIR ACT CIVIL PENALTY POLICY APPLICABLE TO PERSONS WHO MANUFACTURE OR IMPORT CONTROLLED SUBSTANCES IN AMOUNTS EXCEEDING ALLOWANCES PROPERLY HELD UNDER 40 C.F.R. PART 82: PROTECTION OF THE STRATOSPHERIC OZONE

Introduction

This appendix provides guidance for calculating the civil penalties EPA will require in pre-trial settlement of district court enforcement actions, pursuant to Title I of the Clean Air Act ("CAA"), against persons who manufacture or import controlled substances in amounts exceeding allowances properly held under 40 C.F.R. Part 82, Protection of the Stratospheric Ozone ("THE Rule").¹ Settlement of violations of the record keeping and reporting provisions of the Rule need not, for purposes of penalty assessment, be treated differently from any other CAA record keeping and reporting violation. See Clean Air Act Stationary Source civil Penalty Policy, p. 11.

The Rule designates bulk quantities of the chemicals named in Appendix A as controlled substances" on the basis of the demonstrated capacity of these chemicals to attack and destroy ozone in The stratosphere. Manufacturers and importers of the controlled substances who responded to EPA's request for baseline data are apportioned yearly production and consumption allowances which limit the amounts of controlled substances that person or corporate entity may introduce for use into The United States during a twelve month control period.²

To assist EPA in monitoring compliance with production and consumption limits, the Rule requires manufacturers of controlled substances to keep daily records and submit quarterly reports to EPA. Importers must submit information to EPA regarding the quantity of controlled substances brought into the United States and The country of their origin.

Production and consumption allowances may be traded, but such transactions are invalid if not reported to EPA. If Agency records indicate that the seller of allowances holds a sufficient quantity unexpended, EPA will issue a notice of no objection, and enter the transfer in its records. If EPA initially does not object to an allowance trade, but later finds reason to

disapprove, the Agency will rescind the earlier transfer and correct its records. For The purposes of the Rule, ownership of The allowances that were the subject of The rescinded transfer never shifted from The seller to the buyer.

The Penalty for Excess Amounts

The Rule states that each kilogram of controlled substances manufactured or imported in excess of allowances is a separate violation.³ Each excess kilogram, therefore, creates potential liability in The violator for a penalty of up to The statutory maximum of \$25,000. To promote judicial economy and to conserve Agency resources, EPA will be willing to accept substantially less in settlement.

The relative amount of stratospheric ozone that will be destroyed by a given quantity of a controlled substance is called that substance's ozone depletion weight, and varies from chemical to chemical.⁴ Allowances are allocated on the basis of a calculated level, i.e., the total ozone depletion effect of all controlled substances produced and imported, a value that is expressed in kilograms. The holder of allowances is free to produce or import any combination of controlled substances during the control period so long as The calculated level of this activity does not exceed The calculated level of The allowances it holds. When the rule states that each kilogram in excess of allowances is a separate violation, the reference is to kilograms in the sense of a calculated level. Therefore, The statutory maximum penalty is \$25,000 per kilogram of calculated level manufactured or imported in excess of properly held allowances.

Calculating a Penalty

In accordance with the general practice EPA follows when calculating all Clean Air Act civil penalties, penalties assessed for manufacturing or importing excess quantities of controlled substances will be the sum of an economic benefit component and a gravity component.

Economic Benefit

Determining The actual economic benefit accruing to the violator will be difficult, if not impossible. Some allowance holders produce a variety of controlled substances at different locations across the country. Rather than attempt to distinguish

what amount of which chemical produced at each of several continuously operating facilities was responsible for how many kilograms of excess calculated level, EPA will instead rely on an economic benefit rule of thumb. On The basis of financial information currently available, EPA will assume an economic benefit (profit margin) or \$1.50 per kilogram of calculated level for both The manufacture and importation of controlled substances. EPA may supplant this amount by reference to price lists appearing in industry journals or to any other source which the agency believes is a reliable indicator. Because the agency's economic benefit rule of thumb is subject to change, in situations where the region is applying this penalty policy, Regional staff should consult with EPA Headquarters before attempting to assess the violator's economic benefit of noncompliance.

The violator's economic benefit may be offset by amounts paid for allowances purchased during the same control period to cure excess production or imports, as such purchases clearly lessen The economic benefit of noncompliance.

The economic benefit component may be omitted entirely if an allowance-apportioned violator agrees in The next control period to a reduction of its current allowances in amounts equal to The calculated level of its earlier violations. The economic benefit component will not be assessed against violators who are not apportioned allowances if such violators obtain int he next control period and hold unexpended allowances in amounts equal to the calculated level of their earlier violations. The Montreal Protocol odes not permit member nations to meet their national limits by applying allowances left unexpended in one control period to negate excess quantities of controlled substances manufactured or imported in any other control period. EPA, however, can acknowledge the financial impact on importers of a reduction of current allowances and adjust the penalty assessment accordingly in order to provide importers with an incentive to consent to injunctive relief mandating such reductions. In this way, EPA can help avert the potential environmental harm resulting from the violator's actions.

Gravity

Even if the violator demonstrates that its purchase of additional allowances or its voluntary reduction of current allowances eliminates its economic benefit, it still must pay the

gravity component of the penalty. The gravity component is the measure of The seriousness of the violation. Accordingly, this component is linked both to the integrity of the regulatory system and to the ozone-depleting effect of the violator's actions. The Rule states that each kilogram of controlled substance manufactured or imported in excess of allowances is a separate violation.

To protect the integrity of The Rule, EPA will assess a penalty of \$15,000 against all violators. An additional \$0.50 for each kilogram of calculated level manufactured or imported I excess of allowances held at the time of manufacture or importation will be assessed against first time violators, or \$1.00 for each kilogram against repeat offenders.

So that the penalty will reflect the seriousness of the environmental harm resulting from the violations and to provide violators with an incentive to cure their violations completely, EPA will assess a penalty of \$15,000 against violators who leave any amount of their violations, no matter how small, uncured. EPA will assess an additional penalty of \$.50 for each kilogram of calculated level left uncured at the end of the control period in question. In the event that the violator expeditiously and fully cures its violations in the next control period following factor at \$5,000, instead of \$15,000, and the kilograms of calculated level left uncured will be assessed at \$0.10 for each kilogram.

A violator can cure the potential environmental harm by purchasing allowances, by chemically transforming the controlled substances into other substances not regulated by the rule, by proper exportation, or by any combination of these means. In keeping with the matrix provided by the general stationary source civil penalty policy, p. 11, EPA will assess and additional amount to scale the penalty to the size of the violator.

Adjustments to the gravity component must be made in accordance with the provisions of the general stationary source civil penalty policy, pp. 12-18, taking into account such factors as degree of willfulness or negligence, degree of cooperation, and history of noncompliance. EPA construes these adjustment factors strictly, with a bias toward upward adjustment. Downward adjustments to the gravity component will be effected only in rare instances where The defendant manifests extreme cooperation by agreeing to perform environmentally beneficial actions not required by law that are directly related to repairing the

environmental harm potentially resulting from its violations.

Mitigating Penalty Amounts

Application of this policy significantly compromises the penalty amount EPA is authorized to pursue under both the CAA and the Rule. Penalty amounts calculated in accordance with this policy represent the minimum penalty that EPA can accept in settlement of cases of this nature. Reductions from this amount are acceptable only on the basis of the violator's demonstrated inability to pay the full amount (substantiated by The ABEL computer model) or other unique factors. A proposed penalty reduction, accompanied by a justification memorandum, must be submitted to the Associate Enforcement Counsel for Air for his approval.

Examples of Penalty Calculations

Following are four examples of application of this policy. Adjustments to The gravity component are made in accordance with the general stationary source civil penalty policy.

Example 1

Due to inadequate communications between its seven facilities for the production of controlled substances, Chemical Co. Overshoots its production and consumption allowances of 147,000,000 kg of calculated level by 250,000 kg before ceasing all production on May 20. On June 5, Chemical Co. Manages to purchase 200,000 kg of calculated level in additional allowances at a cost of \$200,000.

Assuming that Chemical Co. does nothing more to cure its violations, the penalty is commuted as follows:

Economic Benefit Component

Profit on sale of wrongfully produced controlled substances (250,000 kg at \$1.50/kg*)	\$375,000
Offset by actual expenditure of \$200,000 to purchase additional allowances	-200,000
	\$175,000

Gravity Component

Integrity of Regulation	\$15,000
250,000 kg of calculated level wrongfully produced (at \$0.5/kg)	125,000
Integrity of Regulation (amounts left uncured)	15,000
50,000 kg of calculated level left uncured at close of control period (at \$0.5/kg)	25,000
Size of violator (worth in excess of \$70,000,000)	+65,000
	\$245,000

Preliminary deterrence amount

Economic Benefit Component	\$175,000
Gravity Component	+245,000
	\$410,000

Adjustment factors

20% upward adjustment to the gravity component to reflect defendant's negligence	+49,000
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Minimum penalty settlement amount

\$459,000

If, in the next control period prior to settlement, Chemical Co. Obtains and holds unexpended sufficient consumption allowances to avert the environmental harm potentially resulting from the uncured portion of its wrongful production, the penalty would be calculated as follows:

Economic Benefit Component

Because Chemical Co. Has obtained consumption allowances in an amount equal to the total amount of its violations, there were not costs averted, and there is no remaining

economic benefit.	\$0
Gravity Component	
Integrity of Regulation	\$15,000
250,000 kg of calculated level wrongfully produced (at \$0.5/kg)	125,000
Integrity of Regulation (amounts left uncured, but environmental harm averted)	5,000
Size of violator (worth in excess of \$70,000,000)	+65,000
	\$215,000
Preliminary deterrence amount	
Economic Benefit Component	\$0
Gravity Component	\$215,000
	\$215,000
Adjustment factors	
20% upward adjustment to the gravity component to reflect defendant's negligence	+\$43,000
Minimum penalty settlement amount	
	\$258,000

Example 2

Commodities, Inc., which does not normally deal in chlorofluorocarbons (CFCs), works toward buying up the unexpended consumption allowances it needs to permit its purchase of 1,000,000 kg of calculated level of a controlled substance from a seller in Country A at a price of \$1,5000,000. The shipment of cheap CFCs is offloaded at The American port of entry while Commodities, Inc. is still negotiating with Company Z to buy the last block of 300,000 kg of calculated level of allowances. In Country B, a major industrial accident virtually destroys that country's largest producer of CFCs, suddenly crating a huge demand in that country for Commodities, Inc.'s CFCs. Commodities, Inc.

immediately breaks off negotiations with Company Z and exports its entire stock of 1,000,000 kg of calculated level to Country B for a selling price of \$3 million. Commodities, Inc. provides proof to the EPA of its export and receives consumption allowances in the amount of 1,000,000 kg of calculated level, which it Then sells on The bullish CFC market at \$2,00 per kilogram of calculated level.

During settlement negotiations with EPA, Commodities, Inc. introduces records showing that it purchased 700,000 kg of calculated level of consumption allowances for \$0.75 per kilogram and argues that this amount should be used to calculate its economic benefit.

The penalty is computed as follows (for the purposes of this exercise, we assume that Commodities, Inc. bore none of the shipping expenses):

Economic Benefit Component

Cost averted by not purchasing allowances (300,000 kg at \$1.50/kg*)	\$450,000
Profit on export sale of wrongfully imported controlled substances (300,000 kg at \$1.50/kg)	450,000
Profit on sale of wrongfully obtained consumption rights (300,000 kg at \$2.00/kg)	+600,000
	\$1,500,000

In computing Commodities, Inc.'s economic benefit, EPA would not use \$0.75/kg as The cost averted by not purchasing allowances because Company Z, apparently, was unwilling to sell at The price Commodities, Inc. was offering. EPA would not use Commodities, Inc.'s later selling price, \$2.00/kg, because that amount does not necessarily reflect the market rate at the time Commodities, Inc. was attempting to buy. In the absence of a more reliable figure, EPA will use The \$1.50/kg rule of thumb. The profit on the sale of wrongfully imported controlled substances is simply the difference between the selling price and The defendant's purchase price ($\$3.00/\text{kg} - \$1.50/\text{kg} = \$1.50/\text{kg}$) as There were no allowance costs for these 300,000 kilograms. The profit on The sale of the wrongfully obtained consumption allowances is The full selling price because the defendant never properly held consumption allowances for those 300,000 kilograms.

Gravity Component

Integrity of Regulation	\$15,000
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300,000 kg of calculated level wrongfully imported (at \$0.5/kg)	150,000
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Integrity of Regulation (amounts left uncured)	15,000
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300,000 kg of calculated level left uncured at close of control period (at \$0.5/kg)	150,000
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Reporting violation - one incorrect report See general CAA penalty policy at 11. (Although Commodities, Inc. did export 1,000,000 kg of calculated level of a controlled substance, only 700,000 kg of that amount had entered the country legally. Therefore, Commodities, Inc.'s transfer request could not properly claim ownership of The entire 1,000,000 kg of calculated level.)	15,000
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Size of violator (worth between \$20-40 million)	+20,000
\$365,000	

Preliminary Deterrence Amount

Economic Benefit Component	\$1,500,000
Gravity Component	+365,000
	\$1,865,000

Adjustments Factors

Degree of willfulness or negligence (20% of The gravity component)	+73,000
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Minimum settlement penalty amount	\$1,938,000
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If, in the next control period prior to settlement,
Commodities, Inc. had obtained and held unexpended The 300,000
kilograms of calculated level of consumption allowances necessary
to avert the potential environmental harm resulting form its

wrongful importation, the penalty would be calculated as follows:

Economic Benefit Component

Profit on export sale of wrongfully imported controlled substances (33,000 kg at \$1.50/kg)	450,000
Profit on sale of wrongfully obtained consumption rights (3000,000 kg at \$2.00/kg)	+600,000
	\$1,050,000

Gravity Component

Integrity of Regulation	\$15,000
300,00 kg of calculated level wrongfully imported (at \$0.5/kg)	150,000
Integrity of Regulation (amounts left uncured, but environmental harm averted)	5,000
300,00 kg of calculated level left uncured, but environmental harm averted (at \$0.1/kg)	30,000
Reporting violation - one incorrect report	15,000
Size of violator (worth between \$20-40 million)	+20,000
	\$235,000

Preliminary Deterrence Amount

Economic Benefit Component	\$1,050,00
Gravity Component	+235,000
	\$1,285,000

Adjustment Factors

Degree of willfulness or negligence (20% of the gravity component)	+47,000
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Minimum settlement penalty amount	\$1,332,000
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Example 3

During the fourth quarter of the control period, Importers International contracts to sell 40,000 kg of calculated level of consumption allowances to CFCs, Inc., a producer and importer of CFCs, Inc., a producer and importer of CFCs, at \$1,25/kg, despite The act that Importers International has recently exhausted all of its 250,000 kg allowance. Importers International submits a transfer request to EPA for which the Agency issues a no objection notice. (EPA's determination is based on information contained in Importers International's previous quarterly report.) Upon receipt of EPA's notice of no objection, CFCs, Inc. purchases the allowances from Importers International for \$50,000 and imports 40,000 kg of calculated level of controlled substances. EPA discovers during its review of Importers International's fourth quarter report that the company did not hold unexpended allowances at the time of the trade, rescinds The transfer, and notifies both parties to The transaction.

Importers International's action appears to be a fraudulent transfer in knowing violation of consumption limitations, and this matter should be referred to OE's Office of Criminal Enforcement. Importers International is probably subject to fines and imprisonment under 113(c) of The Clean Air Act, 18 U.S.C. 1001 (supplying false information to the federal government), and possibly 18 U.S.C. 1341 (fraudulent use of the mails).⁵

CFCs, Inc., which purchased Importers International's purported allowances at risk, held other consumption allowances at the time it imported the 40,000 kg of calculated level. These other consumption allowances, in part, offset that import. After analyzing CFCs, Inc.'s final quarter reports, EPA determines that CFCs, Inc. is liable for the importation of only 15,000 kg of calculated level of controlled substances for which it did not hold proper consumption allowances. After receiving notification from EPA, CFCs, Inc. Agrees to reduce its current-year production and consumption allowances by the amount.

The penalty for CFC, Inc. is computed as follows:

Economic Benefit Component

Profit on sale of wrongfully produced CFCs (15,000 kg at \$1.50/kg*)	\$22,500
Offset by reduction of current-year allowances by 15,000 kg of calculated level	-22,500

0

Gravity Component

Integrity of Regulation \$15,000

15,000 kg of calculated level
wrongfully imported (at \$0.5/kg) 7,500

Integrity of Regulation
(amounts left uncured, but environmental
harm averted) 5,000

15,000 of calculated level left uncured,
but environmental harm averted (at \$0.10/kg) 1,500

Size of violator (worth more than \$70 million) +65,000
\$94,000

Preliminary Deterrence Amount

Economic Benefit Component \$0
Gravity Component +94,000
\$94,000

Adjustment Factors

No adjustments of gravity 0

Minimum Settlement Penalty Amount
\$94,000

Example 4

Small Brokerage Co., an import broker located in a minor port city, imports 200 kg of calculated level of CFC-113 for Company X, a manufacturer of airplane parts. Company X intends to use The CFC-113 to degrease precision metal parts prior to assembly. Neither company holds consumption allowances. EPA discovers the violation during its review of the computer printout of Customs Entry Summary forms provided to EPA by The U.S. Census Bureau.

Upon receipt of a SECTION 114 letter from EPA requesting more information about its imports of controlled substances,

Small Brokerage Co. contracts EPA to explain that neither it nor Company X was aware of the Rule's prohibition on importing controlled substances without consumption allowances. EPA discovers the violation during its review of the computer printout of Customs Entry Summary forms of the computer printout of Customs Entry Summary forms provided to EPA by the U.S. Census Bureau.

Upon receipt of a Section 114 letter from EPA requesting more information about its imports of controlled substances, Small Brokerage Co. contracts EPA to explain that neither it nor Company X was aware of the Rule's prohibition on importing controlled substances without consumption allowances. Small Brokerage Co. fully responds to the Section 114 request, but points out that its imports were in one liter canisters, and asserts exemption under the "one-gallon rule of thumb."

The one-gallon rule of thumb exempts from regulation imports of controlled substances in containers of one gallon or smaller only if the eventual use of the container is not known and cannot be determined with reasonable efforts. (See GUIDANCE FOR THE STRATOSPHERIC OZONE PROTECTION PROGRAM, pp. 4-5.) Here, EPA investigates the process Company X uses to degrease small metal parts and determines that Company X pours CFC-113 from the one liter canister into a basin containing the parts to be cleaned. Therefore, the eventual use of the imported canister is known, and the canister is not part of a "use system." EPA informs Small Brokerage Co. that its imports are subject to regulation. Before the end of the control period, Small Brokerage Co. obtains from another company a sufficient amount of unexpended consumption allowances to cure its violations.

The penalty is calculated as follows:

Economic Benefit Component

Because Small Brokerage Co. obtained consumption allowances in an amount equal to the total amount of its violations, there were no costs averted, and there was no economic benefit. \$0

Gravity Component

Integrity of Regulation \$15,000

200 kg of calculated level wrongfully
imported (at \$0.5/kg) 100

Size of violator (worth between \$100,001
and \$1,000,000) \$2,000
\$17,000

Preliminary Deterrence Amount

Economic Benefit Component \$0
Gravity Component \$17,000
\$17,000

Adjustment Factors

Degree of willfulness of negligence
(20% of the gravity component)+\$3,400

Minimum Penalty Amount
\$20,400

1. The Rule was promulgated in accordance with the Agency's authority under CAA Part B -- Ozone Protection, 42 U.S.C. 150-159 ("Part B"), and with the Montreal Protocol (an agreement signed by most industrial nations in 1987), to protect the stratospheric ozone layer, a thin blanket of triatomic oxygen fifteen miles above the surface of the earth that blocks harmful ultraviolet radiation emitted by the sun. Section 113 of the CAA references Part B, expressly providing that the 113(b) civil and the 113 criminal remedies are available for violations of regulations promulgated under that Part.

2. EPA restricted production and consumption of five chlorofluorocarbons (CFCs) to 1986 levels beginning July 1, 1989. Additional restrictions on production and consumption of CFCs, and other controlled substances were in development at this writing.

3. 40 C.F.R. 82.4(a) and (b).

4. The ozone depletion weights for the controlled substances can be found in Appendix A of 40 C.F.R. Part 82.

5. EPA's election to pursue a criminal enforcement action must hinge on its evaluation of the strength of the evidence of knowing violation and also of the adequacy of available civil relief. Where a defendant exceeds its production or consumption allowances and submits inaccurate information in a transfer request, EPA may find it difficult to show a knowing violation, but large civil penalties are available. If the defendant stays within the limits of its allowances but transfers allowances it does not hold, the available civil relief would be based on a single reporting violation, but EPA can more likely demonstrate that the violation was knowing. It is important also to remember that buyers of large amounts of allowances will be aware of the financial risk associated with wrongful production or importation and will purchase only from reputable sellers.

6. CFCs, Inc.'s economic benefit would not be offset by the amount it paid to Importers International for the purported allowances. Only those transactions which result in a transfer of valid consumption allowances to the violator can be counted against its economic benefit.

* The economic benefit rule of thumb is subject to change.
Regional offices using this guidance should consult with
Headquarters to insure that they use the appropriate number.

APPENDIX IX

CLEAN AIR ACT CIVIL PENALTY POLICY APPLICABLE TO PERSONS WHO PERFORM SERVICE FOR CONSIDERATION ON A MOTOR VEHICLE AIR CONDITIONER INVOLVING REFRIGERANT OR WHO SELL SMALL CONTAINERS OF REFRIGERANT IN VIOLATION OF 40 C.F.R. PART 82, PROTECTION OF THE STRATOSPHERIC OZONE, SUBPART B: SERVICING OF MOTOR VEHICLE AIR CONDITIONERS

July 19, 1993

Introduction

This appendix provides guidance for calculating the civil penalties EPA will require in pre-trial settlement of judicial enforcement actions, as well as the pleading and settlement of administrative enforcement actions, pursuant to Sections 113(b) and (d) and Section 609 of the Clean Air Act ("CAA"), as amended, and 40 C.F.R. Part 82, Subpart B against persons who perform service for consideration on motor vehicle air conditioners involving the refrigerant or who sell small containers of refrigerant. Settlement of violations of the recordkeeping and reporting provisions of the regulations should not, for purposes of penalty assessment, be treated differently from any other CAA recordkeeping and reporting violation. See Clean Air Act Stationary Source Civil Penalty Policy, p. 12.

This appendix is to be used for settlement purposes in civil judicial cases, but EPA retains the discretion to seek the full statutory maximum penalty in all civil judicial cases which do not settle. In addition, for administrative penalty cases, the appendix is to be used in conjunction with the Stationary Source Civil Penalty Policy to determine an appropriate penalty to be pled in the administrative complaint, as well as serving as guidance for settlement amounts in such cases.

To assist EPA in monitoring compliance, the regulations require persons who perform service for consideration on motor vehicle air conditioners involving the refrigerant to report one-time and to keep records; persons who certify technicians must report once every two years; and persons who sell small cans of refrigerant must keep records and post a sign.

The Penalties for Violating regulations

Section 113 of the Clean Air Act allows EPA to seek

penalties of up to \$25,000 per day per violation~ Each time a motor vehicle air conditioner is serviced without properly using approved refrigerant recycling or recovery equipment or is serviced by an uncertified technician, each container of refrigerant containing less than 20 pounds is sold to a person who is not a certified technician or who does not certify to the retail establishment that the container was purchased for resale, and each time a technician is certified by a technician training program which has not been approved by the EPA Administrator constitutes a separate violation (each with a statutory maximum of \$25,000).

EPA may in appropriate cases accept less than the statutory maximum in settlement. The penalty assessments contained in this policy (this appendix read with the Stationary Source Civil Penalty Policy) reflect reductions from the statutory "maximum which can be made based on the~statutory penalty assessment . criteria found in Section 113(e) of the Act. This policy takes into account the size of the violator's business, the violator's full compliance history, the economic benefit of noncompliance, and the seriousness of the violation. The other factors in Section 113(e) such as the economic impact of the penalty on the business and any good faith efforts to comply should be taken into account in determining whether the penalty should be reduced, but the burden is on the defendant to raise those factors.

Penalties for violations are based on the particular regulatory requirements violated. The minimum settlement penalty amount is the sum of the penalties assigned to each violation of a requirement.

Calculating a Penalty

In accordance with the general practice EPA follows when calculating all Clean Air Act civil penalties, penalties assessed for performing any service for consideration on a motor vehicle air conditioner involving the refrigerant or selling small containers of refrigerant will be the sum of an economic benefit component and a gravity component.

Economic Benefit

This component is a measure of the economic benefit accruing to the facility as a result of noncompliance with the Act. To

determine the actual economic benefit to a person¹ who performs service for consideration on motor vehicle air conditioners involving the refrigerant, EPA will rely on the matrix which follows to determine the economic benefit from delayed costs (failure to purchase approved recycling or-recovery equipment) and avoided costs (failure to properly operate and maintain such equipment).

Economic Benefit From Servicing Motor Vehicle Air Conditioners Without Properly Using Approved Refrigerant Recovery Equipment:

Number of Months since August 13, 1992/Economic Benefit

of
Month
Economic
Benefit
of
Months
Economic
Benefit
of
Months
Economic
Benefit

1-3
\$115
22-24
\$1103
43-45
\$2494

4-6
\$236
25-27
\$1274
46-48
\$2733

7-9
\$363

28-30
\$1454
49-51
\$2984

10-12
\$496
31-33
\$1642
52-54
\$3247

13-15
\$637
34-36
\$1840
55-57
\$3523

16-18
\$785
37-39
\$2048
58-60
\$3811

19-21
\$940
40-42
\$2266

The matrix reflects that the service facility should have purchased one piece of recovery equipment. The matrix was calculated using August 13, 1992 as the date noncompliance began. The date of compliance (the date equipment is acquired) and the date that the penalty is paid are the same. Because the matrix reflects that enforcement actions will be taken against the service facility and because many technicians will be personally

responsible for the cost of getting trained and certified, the matrix does not include the cost of technician certification. In addition, it is difficult to predict how many uncertified technician a service facility might employ to perform service for consideration on motor vehicle air conditioners involving the refrigerant. If the Regions find that service facilities usually pay for technician training, then they should include the cost of technician training and certification in their economic benefit calculations. In any enforcement action against an individual uncertified technician, the Regions should include the cost of training and certification in the economic benefit calculation. The matrix is based on the BEN computer model. If the litigation team determines that the matrix does not reflect the defendant's actual economic benefit in a particular enforcement action, the litigation team may calculate the benefit using the BEN model with inputs specific to the action.

The economic benefit to the person² who sells cans of refrigerant containing less than 20 pounds is the profit on each can. The profit will vary depending on how much the person paid to purchase the cans and at what price the cans are sold. The amount of profit averages \$1.50 per 12 ounce can.

EPA policy requires the removal of the violator's economic benefit in every enforcement action, unless the factors in Section 133(e) or litigation risks suggest that a reduction is appropriate. Although the Stationary Source Civil Penalty Policy indicates that the litigation team may elect not to assess an economic benefit component in enforcement actions where the violator's economic benefit is less than \$5,000 (see p. 7), Regions should assess the economic benefit component in Section 609 enforcement actions. Given that the economic benefit component in Section 609 enforcement actions will likely always be small (less than \$5,000), if the general rule from the Stationary Source Civil Penalty Policy were to apply, the economic benefit component would rarely be included in the penalty calculation. Therefore, Regions should assess an economic benefit component in all Section 609 cases.

Gravity

In addition to economic benefit, the violator must pay the gravity component of the penalty. The gravity component is the measure of the seriousness of the violation. The seriousness of the violation has two components: the importance to the

regulatory scheme and the potential environmental harm (ozone-depleting effect of the violator's actions) resulting from the violations.

The following violations can defeat the purpose of Section 609 by permitting the release of substances that degrade the stratospheric ozone layer. Their importance to the regulatory scheme, therefore, includes the assessment of the following penalties:

A penalty of \$10,000 against any person who performs services for consideration on motor vehicle air conditioners involving the refrigerant without properly using approved refrigerant recycling or recovery equipment;

A penalty of \$15,000 against each person who performs services for consideration on motor vehicle air conditioners involving the refrigerant without properly using approved refrigerant recycling or recovery equipment and who has previously been the subject of a Section 609 enforcement response (e.g. notice of violation, warning letter, administrative order, field citation, complaint, consent decree, consent agreement, or administrative or judicial order);

A penalty of \$5,000 against any person who performs services for consideration on motor vehicle air conditioners involving the refrigerant for each person who performs such service who is not properly trained and certified by a technician certification program approved by the EPA Administrator;

A penalty of \$2,000 against any person who sells a container of refrigerant (suitable for use in a motor vehicle air conditioner) containing less than 20 pounds to a person who is not a certified technician or who does not certify to the seller that the container was purchased for resale;

A penalty of \$5,000 against any person who sells a container of refrigerant containing less than 20 pounds to a person who is not a certified technician or who does not certify to the seller that the container was purchased for resale and who has previously been the subject of a Section 609 enforcement response (e.g. notice of violation, warning letter, administrative order, field citation, complaint, consent decree, consent agreement, or administrative or judicial order);

A penalty of \$5,000 for each certificate issued after the effective date of the regulation against any technician training program that has not received approval from the Administrator of EPA;

A penalty of \$1,000 against any retail establishment that sells or offers for sale the refrigerant suitable for use in a motor vehicle air conditioner in containers of less than 20 pounds and fails to post a sign that meets the requirements of 40 C.F.R. §82.42(c). This amount should be assessed regardless of how many (if any) small cans are actually sold after November 15, 1992, as long as they are offered for sale. This amount is in addition to the \$2,000 assessment described above against the retail establishment for the sale of a container of refrigerant containing less than 20 pounds to a person who is not a certified technician or who does not certify to the retail establishment that it is purchased for resale;

A penalty of \$2,500 against any retail establishment that sells or offers for sale the refrigerant suitable for use in a motor vehicle air conditioner in containers of less than 20 pounds and fails to post a sign that meets the requirements of 40 C.F.R. §82.42 and who has previously been the subject of a Section 609 enforcement response (e.g. notice of violation, warning letter, administrative order, field citation, complaint, consent decree, consent agreement, or administrative or judicial order);

EPA acknowledges that multiple violations of the Section 609 requirements may significantly increase the potential environmental harm (ozone-depleting effect of the violator's actions) resulting from the violations. The Agency, therefore, will assess the following additional amounts for each separate violation to ensure that the total penalty assessed appropriately reflects the seriousness of the defendant's violations:

EPA will assess \$403 against any person for each motor vehicle air conditioner serviced without properly using approved refrigerant recycling or recovery equipment, or \$50 against any person who has previously been the subject of a Section 609 enforcement response (e.g. notice of violation, warning letter, administrative order, field citation, complaint, consent decree, consent agreement, or administrative or judicial order) for each motor vehicle air conditioner serviced without properly using approved refrigerant recycling equipment; and

EPA will assess \$184 per pound against any person for each sale of a container of refrigerant containing less than 20 pounds to a person who is not a certified technician or who does not certify to the retail establishment that it is purchased for resale and \$25 against any person that has previously been the subject of a Section 609 enforcement response (e.g. notice of violation, warning letter, administrative order, field citation, complaint, consent decree, consent agreement, or administrative or judicial order)- for each sale of a container of refrigerant containing less than 20 pounds to a person who is not a certified technician or who does not certify to the retail establishment that it is purchased for resale.

EPA will assess reporting violations pursuant to the Clean Air Act Stationary Source Civil Penalty Policy, October 25, 1991, page 12. However, this assessment shall not include a length of time violation component.

EPA will assess an additional amount to scale the penalty to the size of the violator using the following matrix:

Net worth (corporations): or net current assets (partnerships and sole proprietorships):

Under \$100,000

\$0

\$100,001-\$500,000

\$1,000

\$500,001-1,000,000

\$2,500

\$1,000,001-5,000,000

\$5,000

\$5,000,001-20,000,000

\$10,000

\$20,000,001-40,000,000
\$15,000

\$40,000,001 and above
\$20,000

Where the size of the violator figure represents over 50% of the total preliminary deterrence amount, the litigation team may reduce the size of the violator figure to 50 of the preliminary deterrence amount.

Adjustments to the gravity component must be made in accordance with the provisions of the Stationary Source Civil Penalty Policy, pp. 15-19.

Mitigating Penalty Amounts

Application of this policy significantly compromises the penalty amount EPA is authorized to pursue under the CAA. Penalty amounts calculated in accordance with this policy represent the minimum penalty that EPA can accept in settlement of cases of this nature. Reductions from this amount are acceptable only on the basis of the violator's demonstrated inability to pay the full amount (substantiated in accordance with Agency policy) or other unique factors. In civil judicial actions, a proposed penalty reduction from the amount calculated under this policy must be approved by the Enforcement Counsel for the Air Enforcement Division. If the litigation team believes that reduction of the penalty is appropriate, the case file should contain both a memorandum justifying the reduction and documentation that the penalty reduction was approved. In administrative enforcement actions, Regional Administrators or their designees must submit penalty justification documentation within 20 days of assurance or signing of consent agreements to the Director of the Stationary Source Compliance Division in the Office of Air Quality Planning and Standards and the Enforcement Counsel for Air in the Office of Enforcement.

Examples of Penalty Calculations

Following are examples of the application of this policy. Adjustments to the gravity component are made in accordance with the Stationary Source Civil Penalty Policy.

Example 1

Ace Automotive Air Conditioning Service, Incorporated (ACE) services motor vehicle air conditioners. Despite a significant outreach effort by the Region (acquainting the regulated community with Section 609's requirements), Ace did not submit the required owner certification to EPA and failed to purchase recovery or recycling equipment. A search of Ace's records indicates that Ace has serviced 60 motor vehicle air conditioners since the effective date of the rule. The facility performed 150 service jobs in 1990 and 1991. None of the three technicians who regularly service motor vehicle air conditioners are trained and certified. EPA inspected the facility on March 13, 1993.

Economic Benefit Component

The economic benefit of delaying
the purchase of equipment for seven
months +.avoided costs of operating equipment \$363

Gravity Component

Importance to regulatory scheme (servicing
without equipment
\$10,000

60 motor vehicle air conditioners
(at \$40 per vehicle)
2,400

Reporting violation
(failure to certify to EPA that person
performing service is using approved recycling
equipment and that such person is properly
trained and certified)
(from Stationary Source Civil Penalty Policy,
page 12)
15,000

3 Uncertified technicians performing service
(at \$5,000 per technician)

15,000

Size o violator (Net Worth is approx.

\$2,000,000)

+5,000

Total Gravity

\$47,400

Preliminary deterrence amount

Economic Benefit Component	\$363
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Gravity Component	+47,763
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Adjustment factors

20% upward adjustment to the gravity
component - Ace should have been aware
of Section 609's requirements

+9,552.60

Minimum penalty settlement amount	\$57,315.60
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Example 2

Diamond Auto Parts sells CFCs in canisters containing 14 ounces. On May 16, 1993, an EPA inspector purchased two 14 ounce cans of refrigerant. He was not asked to show his technician training certificate which he claimed to have. In addition, the inspector noted there was no sign in the check out area notifying customers that the sale of such cans is prohibited unless the purchaser is a trained technician. The inspector asked the owner whether the sign was posted on or after November 15, 1992. The owner responded that he never posted the sign.

Economic Benefit Component

2 cans of refrigerant (at \$1.50 per 12 ounce can)	\$3.50
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Gravity Component

Importance to regulatory scheme (Sale of small can of refrigerant	\$2,000
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2 -14 ounce cans of refrigerant (at \$18 per pound)	31.50
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Importance to regulatory scheme (Failing to post sign)	1,000
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Size of violator (Net Worth is approx. \$6,000,000)	+3,031.50
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Total Gravity	\$6,063.00
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Preliminary deterrence amount

Economic Benefit Component	\$3.50
Gravity Component	+6,063.00

Minimum Settlement Penalty Amount

\$6,066.50

Summary

Type of violation

Penalty amount

Servicing without equipment

1st violation - \$10,000

2nd violation - \$15,000

\$40/per motor vehicle

Failing to certify

\$15,000

Uncertified technicians

\$5,000/per technician

Sale of Small Cans to Non-Technician

1st violation - \$2,000

2nd violation - \$5,000

\$18/per pound

Uncertified Training Program

\$5,000/certificate

Failure to Post sign

1st violation - 1,000

2nd violation - 2,500

FOOTNOTES

1. "Person" includes the technician who actually works on the motor vehicle air conditioner and the individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any Agency, department, or instrumentality of the United States who employs the technician. For the purpose of calculating the penalty under this policy, it was assumed that Regions would generally take enforcement actions against service facilities rather than individual technicians. Both technicians and service facilities, however, are legally responsible for complying with 40 C.F.R. Part 82, Subpart B.

2. "Person" includes the employee who actually sells the small can and the individual, corporation, partnership, association, state, municipality, political subdivision of a State, and any Agency, department, or instrumentality of the United States who employs the employee. For the purpose of calculating the penalty under this policy, it was assumed that Regions would generally take enforcement actions against retail facilities rather than individual employees. Both employees and retail facilities, however, are legally responsible for complying with 40 C.F.R. Part 82, Subpart B.

3. EPA estimates that the benefit to be obtained from avoiding the release of 1 kilogram of ozone depleting substance ranges from \$13-\$53/kg. For the purposes of this penalty policy, the benefit should be calculated at \$40/kg. See Regulatory Impact Analysis for Section 608, Chapter 5 (March 25, 1993).

4. See fn. 3.

APPENDIX X
CLEAN AIR ACT CIVIL PENALTY POLICY FOR VIOLATIONS
OF 40 C.F.R. 82, SUBPART F: MAINTENANCE, SERVICE,
REPAIR, AND DISPOSAL OF APPLIANCES CONTAINING REFRIGERANT
June 1, 1994

INTRODUCTION

Purpose

This appendix provides guidance for calculating the civil penalties EPA will require in pre-trial settlement of judicial enforcement actions, as well as the pleading and settlement of administrative enforcement actions.

Scope

This appendix is to be used pursuant to Sections 113(b) and (d) for violations of Section 608 of the Clean Air Act ("Act" or "CAA"), as amended, and 40 C.F.R. Part 82, Subpart F.

Usage

This appendix should be used in conjunction with the Stationary Source Civil Penalty Policy to determine a preliminary deterrence amount, which is the sum of the economic benefit accruing from noncompliance and the gravity component reflecting the seriousness of the violation.

This appendix is to be used for settlement purposes in civil judicial cases involving violations of Section 608, but EPA retains the discretion to seek the full statutory maximum penalty in all civil judicial cases that do not settle. In addition, for administrative penalty cases, the appendix is to be used in conjunction with the Stationary Source Civil Penalty Policy to determine an appropriate penalty to be pled in the administrative complaint, as well as serving as guidance for settlement amounts in such cases. As the Stationary Source Civil Penalty Policy indicates, for administrative penalty cases under Section 113(d)(1), the Region should plead the penalty calculated under this policy, using the most aggressive assumptions supportable, in its complaint.

Person Liable

Any "person" as defined in the Act and in the Section 6084 regulations may be held liable for violations of Section 608. For example, all "persons" owning and/or operating a facility subject to the provisions of the Act, and any employees of such a facility, are legally responsible for complying with Section 608 and with 40 C.F.R. Part 82, Subpart F. For the purpose of seeking penalties for violations, EPA will often bring enforcement actions against the owners and/or operators of such facilities, rather than against individual employees. However, for the purpose of Section 608 violations, "person" includes the technician who services an appliance and the employee who sells refrigerant, as well as the individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any Agency, department, or instrumentality of the United States who employs the technician or employee. Person also includes owners of appliances, disposal facilities, manufacturers and importers of recycling or recovery equipment, technician certification programs, reclaimers, and equipment testing organizations. Matters involving possible criminal behavior by individuals or organizations should be referred to the Regional Criminal Enforcement Counsel.

PENALTIES FOR VIOLATING THE ACT AND THE REGULATIONS

Section 113 of the Clean Air Act allows EPA to seek penalties of up to \$25,000 per day for each violation. EPA may in appropriate cases accept less than this statutory maximum in settlement. The penalty assessments contained in this policy (this appendix read with the Stationary Source Civil Penalty Policy) reflect the statutory penalty assessment criteria found in Section 113(e) of the Act. This policy takes into account the size of the violator's business, the violator's full compliance history, duration of the violation as established by any credible evidence, the economic benefit of noncompliance, and the seriousness of the violation. The other penalty assessment factors in Section 113(e) should be taken into account in determining an appropriate penalty (the economic impact of the penalty on the business, good faith efforts to comply, and payment by the violator of penalties previously assessed for the same violation). However, reliable information on these factors is rarely available to EPA when a penalty is proposed. Accordingly, these factors will be considered if raised and properly documented during settlement. Respondents have the

burden of persuasion on these factors, which are in the nature of affirmative defenses.

CALCULATING A PENALTY

In accordance with the general practice EPA follows when calculating all Clean Air Act civil penalties, penalties assessed for violations of Section 608 and the implementing regulations, ~ 40 C.F.R. Part 82, Subpart F, will be the sum of an economic benefit component and gravity component.

Economic Benefit

This component is a measure of the economic benefit gained by the violator as a result of noncompliance with the Act. The economic benefit gained by a person due to delayed or avoided costs will be determined in accordance with the Stationary Source Civil Penalty Policy using, as appropriate, the BEN computer model. Economic benefit should be calculated from the earliest provable date of violation until the date that the violation is corrected.

BEN is not appropriate in addressing the sales restriction imposed by the regulations. In this case, the economic benefit to the person who sells class I or II substances for use as a refrigerant is the profit on each sale. The profit will vary depending on how much the person paid to purchase the refrigerant and at what price the refrigerant is sold.

Although the Stationary Source Civil Penalty Policy indicates that the litigation team may elect not to assess an economic benefit component in enforcement actions where the violator's economic benefit is less than \$5,000 (see p. 7 of the general policy), Regions should assess an economic benefit component for the entire matter in Section 608 enforcement actions unless it is less than \$500. Given that the economic benefit component in Section 608 enforcement actions will likely always be small (less than \$5,000), if the general rule from the Stationary Source Civil Penalty Policy were to apply, the economic benefit component would rarely be included in the penalty calculation. Since EPA policy requires the removal of the violator's economic benefit in every enforcement action, except for very limited circumstances, Regions should assess an economic benefit component in all Section 608 cases where it is greater than \$500.

Gravity

The gravity component, which is assessed in addition to economic benefit, is the measure of the seriousness of the violation. The gravity component should be determined by examining three factors: the potential environmental harm (ozone-depleting effect of the violators actions) resulting from the violations, the extent of deviation from the statutory or regulatory scheme, and the size of violator.

1. Potential Environmental Harm

The Section 608 regulations were promulgated to prevent harm to human health and the environment by preventing the release of substances that degrade the stratospheric ozone layer.

Noncompliance with the requirements of the regulations therefore, can result in harm to human health or the environment. Accordingly, the portion of the penalty calculation reflecting the potential environmental harm of the violation should be based on two factors:

- 1) the risk of or actual loss of refrigerant to the environment
- 2) the importance of compliance to the statutory or ; regulatory scheme

Risk of or actual loss

The risk of or actual loss presented by a given violation depends on both the likelihood of loss to the environment and the seriousness of the loss, which would include both the amount of refrigerant lost and its ozone depletion potential. A penalty should reflect the probability that the violation could have resulted in, or has resulted in, a loss of refrigerant to the environment. A larger penalty is appropriate for class I chemicals because of the greater ozone depletion potential than for class II chemicals. The greater the potential, the more ozone that may be destroyed in the stratosphere. In most cases, an actual loss would result in higher penalties than a potential loss.

One factor enforcement personnel should evaluate in determining whether the potential for harm is major, moderate, or minor in a particular situation is the risk of loss. The degree

of risk of loss represented by each category is defined as:

MAJOR:the violation poses or may pose a substantial risk of or actual loss of refrigerant to the environment

MODERATE:the violation poses or may pose a significant risk of or actual loss of refrigerant to the environment

MINOR:the violation poses or may pose a relatively low risk of or actual loss of refrigerant to the environment

In determining the degree of the risk of loss of refrigerant to the environment, Regions should consider how much refrigerant is normally in the system (e.g. 20,000 pounds or 2 pounds) and how likely was the activity in question to result in a release (e.g. changing a filter or changing the compressor).

For example, changing the compressor on a system containing 20,000 pounds of CFC-12 without having removed the refrigerant prior to repair would fall into the category of Substantial risk of or actual loss. Changing the filter on the same system without having removed the refrigerant prior to repair would fall into the category of Significant risk of or actual loss. Changing the filter on a system containing 2 pounds of HCFC-22 without having removed the refrigerant prior to repair would fall into the category, of Relatively Low risk of or actual loss. This assumes that filter changes can be accomplished quickly and with a smaller loss of refrigerant.

Importance of compliance to statutory or regulatory scheme

A second factor enforcement personnel should evaluate in determining whether the potential for harm is major, moderate, or minor in a particular situation is the importance of compliance to the statutory or regulatory scheme. The degree of importance of compliance to the statutory or regulatory scheme represented by each category is defined as:

MAJOR:the actions have or may have a substantial adverse effect on the statutory or regulatory scheme

MODERATE:the actions have or may have a significant adverse effect on the statutory or regulatory scheme

MINOR:the actions have or may have a small adverse effect on

the statutory or regulatory scheme

In determining the importance of compliance to the statutory or regulatory scheme, Regions should use the categorizations on the following list unless unusual circumstances suggest the these categories are inappropriate:

Major

1. Knowing Venting
2. Not using recycling/recovery equipment
3. Not repairing leaks (for equipment 50 lbs and over)
4. Accepting signed statement pursuant to §82.156(f)(2) if he person knew or had reason to know that such a signed statement is false
5. Failure to follow required practices in §82.156

Moderate

1. Technicians not properly trained and certified
2. Recovery Recycling equipment not properly maintained/does not pull specified vacuum
3. Not using equipment certified for the type of appliance
4. Manufacture or import of recycling or recovery equipment that is not certified
5. Altering design of certified refrigerant recycling or recovery equipment
6. Unapproved technician training or testing programs issuing certificates
7. Sale and distribution of refrigerants to persons who are not certified technicians after November 1994, unless for resale

Minor

1. Recordkeeping requirements not properly followed
2. Training certificate not available on request
3. Sale of unreclaimed refrigerant
4. Sale of refrigerant reclaimed by uncertified reclaimer
5. Release of more than 1.5% by reclaimer
6. Sale of equipment that does not have servicing aperture or process stub
7. Failure of owner or reclaimer to certify

If, in the Region's analysis, the two factors constituting potential for harm result in two different designations,

the more serious designation should be used. For example, the actions have or may have a substantial adverse effect on the statutory or regulatory scheme, but the violation poses or may pose a relatively low risk of loss of refrigerant to the environment. In this example, the potential for harm would be designated major.

2. Extent of Deviation

The extent of deviation from Section 608 and the implementing regulations relates to the degree to which the violation defeats the requirement violated. In any situation, a range of potential noncompliance with each requirement exists. In other words, a violator may be substantially in compliance with the provisions of a requirement or it may have totally disregarded a requirement. In determining the extent of deviation, the following categories should be used:

MAJOR:the violator deviates from requirements of the regulation or statute to such an extent that most (or important aspects) of the requirements are not met resulting in substantial noncompliance. For example, the owner certification; is not submitted.

MODERATE:the violator significantly deviates from the requirements of the regulation or statute, but some of the requirements are implemented as intended. For example the owner certification is submitted six months late and includes only the name and address of the purchaser and the name and address of the establishment where each piece of equipment is located.

MINOR:the violator deviates somewhat from the regulation or statutory requirements but most, if not all important aspects of the requirements are met. For example, the owner certification is submitted one month late and does not include the number of service trucks used.

Each of the above factors, potential for harm and extent of deviation from a requirement, forms one of the axes of the penalty assessment matrix. The specific cell is chosen after determining which category (major, moderate, minor) is appropriate for the potential for harm factor and which category is appropriate for the extent of deviation factor. The complete matrix is:

Matrix 1:

EXTENT OF DEVIATION FROM REQUIREMENT

POTENTIAL FOR HARM

Major
Moderate
Minor

Major
\$15,000
\$12,000
\$10,000

Moderate
\$9,000
\$7,000
\$4,000

Minor
\$3,000
\$1,500
\$750

For violations by a person who has previously been the subject of a Section 608 enforcement response (e.g. notice of violation, warning letter, or administrative or judicial order), the amounts in Matrix 1 should be increased by a minimum of 30% for the first violation after an enforcement response and by a minimum of 50% for the first violation after the second to subsequent enforcement responses. These percentages may be increased at the Regions discretion.

Multiple Violations

EPA acknowledges that multiple violations of the same requirement by the same company of the Section 608 requirements may significantly increase the actual or potential environmental harm resulting from the violations. The Agency, therefore, will

assess additional amounts against a company for each repeated violation of the same requirement to ensure that the total penalty assessed appropriately reflects the seriousness of time defendant's violations after the base gravity component has been determined from Matrix 1 for the violation of a particular requirement, the multi incident component of the settlement penalty is calculated as follows:

- 1) Using the same gravity-based designations for the violations as were used in Matrix 1, locate the corresponding cell in Matrix 2. If the potential for harm of the initial violation (e.g., venting 20 pounds of HCFC-22) is significantly different than the subsequent violations (e.g., venting 20 pounds of CFC-12), Regions may use a different potential for harm cell in Matrix 2 than the one used in Matrix 1.
- 2) Multiply the dollar amount selected from the appropriate cell in Matrix 2 by the number of violations (e.g., number of additional appliances serviced).

Matrix 2:

EXTENT OF DEVIATION FROM REQUIREMENT

POTENTIAL FOR HARM

Major
Moderate
Minor

Major
\$3,000
\$2,500
\$2,000

Moderate
\$1,800

\$1,200
\$800

Minor
\$600
\$300
\$100

For violations by a person who has previously been the subject of a Section 608 enforcement response (e.g., notice of violation, warning letter, or administrative or judicial order), Regions should also assess an aggravated amount from Matrix 2 (i.e., increased by the same percentage as Matrix 1). The aggravated amount should be multiplied by the number of repeat violations of the same requirement. If the Region believes that this penalty amount is insufficient for deterrent effect, it may apply Matrix 1 to all repeat violations.

3. Size of violator

EPA will scale the penalty to the size of the Violator (calculate only once per violator) Size of violator is determined from an individual's or company's net worth. In the case of a company with more than one facility, the size of the violator figure is determined based on the company's entire operation, not just the violating facility. With regard to parent and subsidiary corporations only the size of the entity sued should be considered. If the Region is unable to determine net worth, it may determine size of violator based on gross revenues from all revenue sources during the prior calendar year. If the revenue data for the previous year appears to be unrepresentative of the general performance of the business or the income of the individual, an average of the gross revenues for the prior three years may be used. The gravity component will be scaled for size of violator using a multiplier. If a business has a net worth of \$300,000 (or gross revenues of \$1,000,000), the appropriate amount from the matrix (or matrices above should be multiplied by 1. For businesses with net worth of less than or more than \$300,000 (or gross revenues of less than or more than \$1,000,000), Regions should divide the net worth by \$300,000 (or the gross revenues by \$1,000,000) to determine the multiplier. Generally, the size of violator component should not be more than 50% of the penalty (i.e., no multiplier greater than 2 would be

used). The penalty for environmental harm/importance to the regulatory scheme multiplied by the size of violator factor, becomes the adjusted gravity component. If EPA is unable to obtain information about either net worth or gross revenues, than the Region should use an aggressive assumption for the size of violator, and adjust it downward if proof of a lower number is presented during negotiations.

Mitigating Penalty Amounts

The penalty amount calculated in accordance with this policy represents the minimum penalty that EPA can accept in settlement of cases of this nature, unless reductions from this amount are made in accordance with the provisions of the Stationary Source Civil Penalty Policy, pp. 15-19 (dated October 25, 1991). In civil judicial actions, a proposed penalty reduction from the amount calculated under this policy must be approved by the Air Enforcement Division. If the litigation team believes that reduction of the penalty is appropriate, the case file should contain both a memorandum justifying the reduction and documentation that the penalty reduction was approved. In, administrative enforcement actions Regional Administrators or their designees must submit penalty justification documentation within 20 days of issuance or signing of consent agreements to the Director of the Stationary Source Compliance Division in the Office of Air Quality Planning and Standards and the Enforcement Counsel for Air in the Office of Enforcement.

Examples of Penalty Calculations

Following are examples of the application of this policy. Adjustments to the gravity component are made in accordance with the Stationary Source Civil Penalty Policy.

Example 1

Grady's Heating and Air-conditioning Service services home and office air conditioning, systems. Hotel A, located in Miami, Florida, is having problems with its air conditioning system. It does not seem to be cooling properly. In October 1993, Hotel hires Grady's to fix the system. One of Hotel A's employees, Grace, notices that the service person is not carrying recovery or recycling equipment. She follows him to where the chiller is located. The unit contains 230 kilograms of CFC-12. She observes

him vent the entire charge from the system. Grace reports her observation to EPA. An inspection by EPA of Grady's facility reveals that the company owns recovery equipment and has apparently properly serviced all other appliances using the equipment. Grady's net worth is \$330,000.

Economic Benefit Component

The economic benefit of not using
the equipment for this job and
avoided labor cost
(less than \$500)\$0

Gravity Component

Knowing venting\$15,000
(from major-major cell)

Analysis: The violator's actions resulted in Major potential for harm because there was an actual less of a substantial amount of CFC-12, which is relatively more ozone depleting than HCFCs, and because a knowing release is prohibited during servicing unless it is de minimis. The violator's actions were a Major deviation from the requirement that persons not knowingly release refrigerant.

Size of violator (Business' net worth
is approximately \$330,000)
 $(330,000/300,000 = * 1.1$
\$16,500

Preliminary deterrence amount

Economic Benefit Component0
Gravity Component+16,500

Minimum penalty settlement amount\$16,500

One year later, the Agency receives a tip that Grady's has hired a new certified technician who is not always using recovery equipment when it is needed. After investigating the tip, the Agency concludes that on three occasions, Grady's has violated the venting prohibition.

Economic Benefit Component

The economic benefit of not using
the equipment for this job and
avoided labor cost
(less than \$500)\$0

Gravity Component

Knowing venting\$15,000
(from major-major cell)
aggravated by 30% (15,000 *.30)
because violation occurred after
an enforcement response+ 4,500
19,500
19,500

Analysis: The violator's actions resulted in Major potential for
harm because there was an actual loss of a substantial
amount of CFC-2, which is relatively more ozone
depleting than HCFCs, and because a knowing release is
prohibited during servicing unless it is de minimis.
The violator's actions were a Major deviation from the
requirement because the company did not comply at all
with the requirement that persons not knowingly release
refrigerant.

Multi-incident assessment
(# of additional violations multiplied
by major-major cell amount)
2 *\$30006,000
aggravated by 30% (6,000 *.30)
because violations occurred after
an enforcement response+1,800
7,800

+ 7,800

27,300

Size of violator (Business' net worth
is approximately \$330,000)
(330,000/300,000 =* 1.1
\$30,030

Preliminary deterrence amount

Economic Benefit Component 0

Gravity Component +30.030

Minimum penalty settlement amount \$30,030

Example 2

Joe, owner of Joe's Repair, has been manufacturing refrigerant recovery devices for small appliances in his spare time. Joe has not had the devices tested or certified by an approved equipment testing organization. Since November 15, 1993, Joe has manufactured seven units and is using them at his shop. When EPA tested the units, it determined that the equipment could recover 50% of the refrigerant in a small appliance. Joe's net worth is \$180,000.

Economic Benefit Component

The economic benefit of delaying
the cost of testing + cost of building
equipment that meets standards or
purchasing approved equipment \$ amount
from BEN

Gravity Component

Manufacturing uncertified equipment \$7,000
(from moderate-moderate cell)

Analysis: The violator's actions resulted in a Moderate potential for harm because there was an actual loss of a significant amount of refrigerant (the equipment can only recover 50%) and because his equipment does not meet the minimum standard for recovery. The violator's actions involve a Moderate deviation from the requirements because although Joe is using some equipment, i.e., he is not simply venting, he did not have his equipment tested and certified.

Multi-incident assessment

(# of additional violations multiplied
by moderate-moderate cell amount)

$6 * \$1200 = \$7,200$

\$14,200

Size of violator (Business' net worth
is approximately \$180,000)

$180,000/300,000 \times .6$

\$ 8,520

Preliminary deterrence amount

Economic Benefit Component??

Gravity Component+ 8,520

Minimum penalty settlement amount\$

Example 3

Dave, a building manager for an office complex in Tacoma, Washington, uses passive recovery equipment when he or his crew (two people) work on the rooftop chiller that contains 30 pounds of R-22. Dave decided not to purchase the appropriate (and more expensive) recovery equipment for the building or get himself or his crew trained and certified. During a routine inspection in January 1994, an EPA inspector discovers that the building does not have the required recovery equipment, nor did Dave or the building owner ever submit a certification indicating that certified equipment had been acquired. The inspector also reviews the building's repair log which shows 5 repairs when the passive equipment was used. The building owner's net worth is \$1,500,000.

Economic Benefit Component

The economic benefit of delaying
the purchase of equipment + cost
of operation and maintenance + \$ amount
cost of certifying technicians from BEN

Gravity Component

Servicing without using
certified equipment \$7,000
(from moderate-moderate cell)

Analysis: The violator's actions resulted in a Moderate potential for harm because there was an actual loss of a significant amount of refrigerant (passive equipment can only recover a small percentage of the actual charge) and because Dave is not using equipment that is

appropriate for the appliance serviced. The violator's actions involve a Moderate deviation from the requirements because although Dave is using some equipment, i.e., he is not simply venting, he is not using the equipment required by the regulations for this type of appliance.

Multi-incident

(# of additional violations multiplied
by major-moderate cell amount)4,800
(4 * \$1200)
9,000

Technicians not certified
(from moderate-major cell)

Analysis: The violator's actions resulted in a Moderate potential for harm because the risk of loss due to untrained technicians improperly using recovery equipment is significant. The violator's actions involve a Major deviation from the requirements because the technicians did not comply with any of the technician certification requirements.

Multi-incident

(# of additional violations multiplied
by moderate-moderate cell amount)2,400
(2 * \$1200)

Failure to submit certification3,000
(from minor-major cell)

Analysis: The violator's actions resulted in a Minor potential for environmental harm because failure of an owner to certify undermines the Agency's ability to determine compliance with the regulations. The violator's actions involve a Major deviation from the requirements because the owner did not comply with any of the certification requirements.

Size of violator (Business; net worth26,200
is approximately \$1,500,000)
(1,500,000/300,000 = 5)

Because generally the size of violator
should be no more than 50% of the
preliminary deterrence amount, the
multiplier is reduced to 2)* 2
\$52,400

Preliminary deterrence amount

Economic Benefit Component ??
Gravity Component+52,400

Minimum penalty settlement amount \$